110-546

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1207.

JOSEPH HURTADO, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 12, 1883.

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1 In the Superior Court of the County of Sacramento, the 20th day of February, A. D. eighteen hundred and eighty two.

STATE OF CALIFORNIA, *County of Sacramento.*

THE PEOPLE OF THE STATE OF CALIFORNIA
against
JOSEPH HURTADO.

Joseph Hurtado is accused by the district attorney of the county of Sacramento by this information of the crime of murder, committed as follows:

The said Joseph Hurtado, on the —— day of February, A. D. 1882, at the said county of Sacramento, in the said State of California, and before the filing of this information, did then and there willfully, unlawfully, feloniously, and with malice aforethought, kill and murder a certain human being, to wit, one Jose Antonio Stuardo, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

HENRY L. BUCKLEY,
District Attorney of Sacramento County, in the State of California.

2 Subscribed to, this 20th day of February, A. D. 1882.

Presented in the superior court of the county of Sacramento, State of California, by the district attorney of said county of Sacramento, and filed as a record of said court, this 20th day of February, A. D. 1882.

THOS. H. BERKEY, *Clerk,*
By CHAS. M. COGLAN, *Deputy Clerk.*

Names of witnesses:

George K. Rider,
Matt. Karcher,
S. P. Doan,
J. L. Wyatt,
Jo. Cantrell,
W. H. Baldwin.

3 MARCH 6th, 1882.

Title of Court and Cause.

Defendant this day appears in court with his counsel, C. T. Jones, and enters his plea of not guilty to the charge in the information herein, and the case is set for trial March 22d, 1882.

4 *Title of Court and Cause.*

FEBRUARY 27th, 1882.

The defendant this day appears in person for arraignment, and gives his true name as charged in the information, and announces that he will employ his own counsel, and the information presented herein against said defendant being read to him, together with the endorsements thereon, and a copy thereof delivered to him, defendant asks and is allowed until March 6th, 1882, at 1:30 p. m. to plead.

5 TUESDAY, *May 2nd*, 1882.

Defendant appears in his own proper person to the bar of this court with his counsel, C. T. Jones, also appears the district attorney, H. L. Buckley, with G. L. Johnson and W. A. Anderson, who prosecute for the people. Defendant announces himself ready for trial. Thereupon the following jurors were drawn, impannelled, accepted by the defendant and people, and sworn to try the case: J. Beachamp, J. H. Carrington, P. B. Green, S. W. Pitcher, R. A. Fisk, B. F. Beans, and Rob't Ward, and the regular *venire* being now exhausted, it is ordered that a special *venire* issue for fifty (50) jurors returnable at 10 o'clock, a. m. to-morrow, to serve as trial jurors during this term of court. After the court had charged the jury, court adjourned until to-morrow at 10 o'clock a. m.

6 *Title of Court and Cause.*

WEDNESDAY, *May 3rd*, 1883.

Defendant in court with his counsel; also appears the counsel for the people, and the jurors who were impannelled and sworn to try the cause on yesterday being in the jury-box, the trial of the cause is resumed. The sheriff returned the special *venire* of fifty (50) persons. Defendant's counsel objected to the panel. Sheriff Heilborn, J. J. Orn, G. L. Johnson, and C. M. Coglan was sworn and examined. Court overrules and denies the challenge to said panel. The following jurors from said special *venire* were duly drawn, impannelled, accepted by defendant and people, and sworn to try the cause, viz: C. D. Weingate, E. Gilkey, W. J. Renfro, N. Mohns, and John Reel; the information presented herein, is read to the jury, and the plea of defendant of "not guilty" stated. The people introduced as witnesses, who are sworn, and testified, viz: Dr. W. H. Baldwin, Geo. K. Reider, Matthew Karcher, Olive Peterson, Joab Cantrell, S. P. Doan, Thos. Waters, Leonard Kellogg, Henry Dark. Further hearing of cause continued until to-morrow at 10 o'clock a. m. Jury placed in charge of sheriff, who was sworn to take proper and legal care of said jury, and to return them into court at said hour.

7 THURSDAY, *May 4th*, 1883.

Defendant in court with his att'y; also appears the dist. attorney and his associate counsel, who prosecute for the people,

and the jury being in attendance, when the trial of the cause is resumed. The people introduce as witnesses, J. E. Levia, and prosecution closed. The defendant's witnesses, who are sworn and testified, are Josefa Cienfuegos, Mrs. Mauretich, Mrs. Kate McMartin. It is ordered by the court that S. P. Doan, a witness from Stanislaus county, who testified in this case, be allowed $25 to pay his expenses while in attendance as a witness. Further trial of cause continued until to-morrow at ten o'clock a. m. Jury placed in charge of sheriff.

Court adjourned until to-morrow at 10 o'clock a. m.

8 FRIDAY, *May 5th*, 1883.

Title of Court and Cause.

Defendant in court with his counsel. Also appear H. L. Buckley, district attorney, and his associate counsel, and the jury who were sworn to try the cause, being in the jury box.

The trial of the cause is resumed. Testimony of Mrs. Mauretich. Defendant also introduces as witnesses Minnie Richards, Amado Cadoza, F. Eisenminger, Mrs. Narcissa Hurtado, A. W. Morrison, Mary Antonio Armigo, Cornelius Russell, Wm. Land, Geo. Eisenmenger, Jeremiah Payne, Wm. Wallace, Chas. C. Brown, Walter B. Ferrall, H. S. Beals, and Mrs. Hurtado; further hearing of cause continued until to-morrow at 10 o'clock a. m. Jury placed in charge of the sheriff.

9 SATURDAY, *May 6th*, 1882.

Title of Court and Cause.

Defendant in court with his attorney, also the district att'y and his associate counsel, and the jury who were duly sworn and accepted to try the cause being in the jury box, when the trial of the cause is resumed. Jury are placed in charge of a sworn officer and retired to the residence of witness, Miss Acampos, who was sworn and testified. Leonora Buleros and J. H. Miller, recognized to be in attendance at 1 o'clock p. m., also Matt. Karcher, attachment issued for John McFetrish, Mrs. Kennedy, and alias Steinman, the defendant, Joseph Hurtado, sworn and testified, also, jury being in jury box, J. H. Miller, John McFetrish, Robert Dunley. Thereupon G. L. Johnson and Henry L. Buckley were sworn to answer questions concerning the condition of Mrs. Kennedy as to her ability to come into court. It appearing to this court from the sworn statement of G. L. Johnson and H. L. Buckley that intimidations have been used for the purpose of preventing witnesses from attending the trial of this cause; it is therefore ordered that Frank Smith,
Mrs. Susie Hurtado, and Mrs. Kennedy be cited to appear
10 before this court on Thursday morning of next week, at 10
o'clock a. m., then and there to answer such questions and submit to such orders as may be by the court made in such case.

The evidence being closed, the case is argued by counsel for people and for the defendant, and thereupon the court proceeds and instructs and charges the jury, and thereupon the jury retire in charge of the sworn officer to deliberate upon their verdict at 10 minutes to twelve o'clock p. m.

11 SUNDAY, *May 7th*, 1882.

Title of Court and Cause.

At 1.45 o'clock, a. m., the jury returned to the court room, the jury-roll was called and all the jurors being present, and the jury desiring further instructions. Further instructions being given to the jury, the jury then retire in charge of the sworn officer to further deliberate upon their verdict, and after further deliberation the jury returned into court, and announce and declare the following verdict as follows, to wit:

THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* JOSEPH HURTADO.

We, the jury in the above entitled cause, find the defendant, Joseph Hurtado guilty of murder of the first degree, as charged.

RICHARD A. FISK, *Foreman.*

The jury was then polled, and each juror being called, and in response to the question by the court: "Is this your verdict?" each juror answered: it was.

12 THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOSEPH HURTADO, *Defendant.*

MONDAY, *May* 8, 1882.

Now here at this day comes the defendant in his own proper person to the bar of this court, with his counsel; also appears the district attorney and his associate counsel, and it is, therefore, ordered by the court, that Monday, May 22d, 1882, at 10 o'clock a. m., be and is hereby fixed, as the time for pronouncing sentence in this cause upon the defendant. It is further ordered by the court, the phonographic reporter of this court do transcribe the notes of the testimony taken by him, at the trial of this cause into long hand.

13 THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* JOSEPH HURTADO.

MONDAY, *May 5th*, 1882.

On motion of counsel for defendant it is ordered by the court that the time for pronouncing sentence upon defendant be, and is hereby, postponed until Monday, June 5th, '82, at 10 o'clock a. m.

14 THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* JOSEPH HURTADO.

This a criminal action or prosecution by information against Joseph Hurtado, the defendant at the bar, charging him with the

crime of murder. He has entered a plea of not guilty, and upon this issue you gentlemen of the jury have been selected and sworn to render a true verdict, according the evidence adduced. You are to decide the case upon the evidence which has been produced upon this trial, and are not to consider any fact the evidence of which has been excluded by the court. The court passes upon all questions of law arising during the trial, and the jury determines the facts upon the evidence admitted. The law by which you are to be governed in considering the case I will now proceed to give you, and your careful attention is invited.

The burden of proof is upon the prosecution. The defendant is presumed to be innocent until his guilt is established by proof. He is entitled to the benefit of any and all reasonable doubts, and cannot be convicted of any degree of crime unless the jury are convinced by the evidence in the case, beyond all reasonable
15 doubt, that he is guilty of such a degree of crime. The term "reasonable doubt" is defined by the law as follows: It is not mere possible doubt, because everything relating to human affairs are depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the facts charged is more likely to be true than the contrary, but the evidence must establish the truth of the charge to a reasonable and moral certainty—a certainty that convinces and directs the understand, and satisfies the judgment of those who are bound to act conscientiously upon it. The jurors must,
16 before a verdict of guilty can be found, be so fully persuaded and convinced of the facts constituting guilt that they can say: We conscientiously and implicitly believe the defendant to be guilty.

The jurors are the sole judges of all questions of fact and of the credibility of witnesses. The jurors are the sole judges of all questions of fact and of the credibility of witnesses. The jurors may believe the whole or any part of the evidence of any witness, and may disbelieve the whole or any part of it, as may be dictated by the exercise of their sound judgment as reasonable men. If any witness has, in your judgment, willfully sworn falsely in any material respect, he is to be distrusted in others, and his testimony should not be accepted and acted upon without great caution. You should carefully scrutinize all of the testimony given, and in doing so consider all the circumstances under which each witness has tes-

tified—his degree of intelligence, his manner while on the stand, the relation he bears to the case, and the manner in which he might be affected by a verdict; his apparent desire to confine himself to the truth or to color his statement; his apparent tenacity or lack of memory; the extent to which he is contradicted
17 or corroborated by other evidence, if at all; and any other consideration that tends to throw light upon the question of his veracity or credibility, and determine the amount of credence to which each witness and each statement is entitled at your hands, as reasonable and intelligent men.

Murder is the unlawful killing of a human being with malice aforethought. Malice may be express or implied. It is express where there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree. In order, therefore, to find the defendant guilty of murder of the first degree, you must be convinced beyond a reasonable doubt that the defendant, Joseph Hurtado, unlawfully and with malice aforethought killed the deceased
18 by lying in wait or by some other kind of willful, diliberate, and premediated killing.

If you believe from the evidence, beyond all reasonable doubt, that the defendant unlawfully and with malice aforethought killed the said deceased, you will find him guilty of murder, and then proceed to determine whether it is murder of the first degree or murder of the second degree; and if you believe from the evidence and beyond all reasonable doubt that such murder was perpetrated by lying in wait, it is murder of the first degree; or if it was perpetrated by any other kind of willful, deliberate, and premeditated killing, it is murder of the first degree, and you will so find. The chief difference which distinguishes murder of the first degree from murder of the second degree consists in the presence in the former of a willful, deliberate, and premeditated intent to kill.

If the jury find the defendant guilty of murder, the next question to be determined is, was the murder accompanied with a deliberate and clear intent to take life. In order to constitute murder of the first degree, the intent to kill must be the result of deliberate premeditation.

It must be formed upon a pre-existing reflection, and not
19 upon a sudden heat of passion sufficient to preclude the idea of deliberation; there need be no appreciable space of time between the intention to kill and the act of killing, they may be as

instantaneous as successive thoughts of the mind. If the act of killing be preceded by concurrence of will, deliberation, and premeditation on the part of the slayer, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing. But if you find the defendant guilty of murder, and still are not convinced beyond all reasonable doubt, that such murder was accompanied or characterized by the circumstances just explained as indicative of murder of the first degree, you can find him guilty of murder of the second degree only. If you find the defendant guilty of murder of the first degree, you have the discretion to determine the nature of his punishment, and if, in your sound judgment and discretion, there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same; but if you find no such mitigation in the facts of the case, and think the death penalty
20 should be inflicted, you will simply find him guilty of murder of the first degree.

Manslaughter is the unlawful killing of a human being without malice, and is of two kinds: 1st. Voluntary, upon a sudden quarrel or heat of passion. 2d. Involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an awful manner or without due caution and circumspection. If you find that the defendant killed the deceased unlawfully, but do not believe beyond all reasonable doubt, that such killing [was] accompanied by malice, you cannot convict the defendant of murder, but of manslaughter only. The defendant cannot be convicted of manslaughter unless the jurors are convinced beyond a reasonable doubt, that the deceased was killed, that the killing was unlawful, and that it was done by the defendant.

Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that
21 the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable, and this he may show by preponderance of evidence merely. By preponderance of evidence is meant that degree of proof which induces the mind of a reasonable man to believe the one side of an issue in preference to the other, any fact the burden of proving which rests upon the defendant, is sufficiently proven when taking the whole evidence upon the point into consideration the jurors believe it to be true, or more likely to be true than untrue, although they may entertain some reasonable doubt as to its truth. Homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant, or doing any other lawful act by lawful means, with usual ordinary caution and without any unlawful intent, or when committed by accident and misfortune, in the heat of passion,

upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

Homicide is also justifiable when committed by any person in either of the following cases: 22

1st. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2nd. When committed in defence of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony, or against one who manifestly intends and endeavors in a violent, riotous, or tumultuous manner to enter the habitation of another for the purpose of offering violence to any person therein; or—

3d. When committed in the lawful defence of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or 4th. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any 23 felony committed, or in lawfully suppressing any riot or in lawfully keeping and preserving the peace. A bare fear of the commission of any of the offences mentioned in subdivisions 2 and 3 of the preceding section quoted from the penal code to prevent which homicide may be lawfully committed is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

To justify a person in killing another in self-defence it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm the killing of the other was apparently necessary, and it must appear, also, that the person killed was the assailant or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.

I have now stated to you all the circumstances under which a voluntary homicide is excusable or justifiable, and, to be more explicit, will instruct you that if the defendant at the bar voluntarily killed the deceased, and you are satisfied from the evidence, beyond all reasonable doubt, of such voluntary killing, then it is your 24 duty to convict him, unless you find from the evidence that the case comes within some one of the specifications of excusable or justifiable homicide.

1st.

Every intendment of the law is in favor of innocence, and this intendment of the law rests with the defendant in every stage of the trial until the case is finally submitted to the jury.

Endorsed: Given at request of defendant.

DENSON, *J.*

3d.

If the defendant had been told of threats made by deceased toward him, of his seeking a pistol, or that he would fix him, Hurtado, then defendant had a right to arm himself when he went to the police court, and the fact that he was armed when he met deceased should not be taken against him.

Endorsed: Asked by defendant, and refused as not good law.

DENSON, *J.*

4th.

The law presumes the character of the defendant to be good until the contrary is clearly proven by competent evidence to your entire satisfaction.

Endorsed: Given at request of defendant.

DENSON, *J.*

25 5th.

If the jury have a reasonable doubt as to which of two offences a defendant is guilty, they can find him guilty of the lesser offence only.

Endorsed: Given at request of defendant.

DENSON, *J.*

If the jury have a reasonable doubt as to any fact necessary to be proved or any element of intent, or condition of mind of the defendant necessarily involved in the charge in the information, it is the duty of the jury to give the defendant the benefit of the doubt and acquit him.

Endorsed: Given at request of defendant.

DENSON, *J.*

6th.

If the jury have a reasonable doubt as to what the punishment of defendant should be if they should find him guilty of murder in the first degree, then they should find such a verdict, but recommend that he be imprisoned for life.

Endorsed: Requested by defendant, and refused as not good law and cumulative.

DENSON, *J.*

26 7th.

The jury are the sole judges of all the facts, and circumstances of the killing, and as to whether, upon the whole, it is one wherein

the defendant should receive the highest penalty of the law or not, or as to what offence, if any defendant is guilty.

Endorsed: Given at request of def't.

DENSON, *J.*

8th.

A person cannot commit a crime without he intended to commit it, as there must be a union or joint operation of act and intent.

Endorsed: Given at request of def't.

DENSON, *J.*

9th.

There is no presumption of malice in this case, if any proof of alleviation, excuse or justification arise out of the evidence for the prosecution.

Endorsed: Requested by defendant, and refused as not good law.

DENSON, *J.*

10th.

The existence of malice is not presumable in this case, if on any rational theory, consistent with all the evidence, the homicide was either justifiable or excusable, or an act of manslaughter.

Endorsed: Requested by defendant and given.

DENSON, *J.*

27 11th.

If on the whole evidence presented by the prosecution, there is any rational hypothesis consistent with the conclusion that the homicide was justifiable or excusable, the defendant cannot be convicted.

Endorsed: Given at request of defendant.

DENSON, *J.*

12th.

If from the whole evidence the jury believe that Mr. Hurtado committed the act, but at the time of doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not in law guilty of murder.

Endorsed: Given at request of defendant.

DENSON, *J.*

13th.

If the jury believe that from any predisposing cause, the prisoner's mind was impaired at the time of killing Estuardo, he became or was mentally incapable of governing himself in reference to Eustardo as the debaucher of his wife, and at the time of his committing said act was by reason of such cause unconscious that he was committing a crime as to said Estuardo, he is not guilty of any offence whatever.

Endorsed: Requested by defendant, and refused as assuming a fact in the case.

DENSON, *J.*

28 14th.

If the jury find that defendant could not control his act when the killing was done, then he is not guilty.

Endorsed: Requested by defendant, and refused as stating the proposition too broadly.

DENSON, *J.*

15th.

It is for the jury to say what the state of the prisoner's mind as to the capacity to decide upon the criminality of the particular act of in question.

These are open questions for the jury as are any other questions which may arise upon the consideration of the evidence, the whole of which is to be taken into view by the jury.

Endorsed: Requested by defendant, and refused as calculated to confuse rather than enlighten the jury.

DENSON, *J.*

17th.

The law does not require that the insanity which absolves from crime should exist for any definite period, but only that it exists at the moment when the act occurred, with which the accused stands charged.

Endorsed: Given at request of defendant.

DENSON, *J.*

29 18th.

If the jury have any doubt as to the case, either in reference to the homicide or the question of sanity, Mr. Hurtado should be acquited.

Endorsed: Refused as not correctly stating the law.

DENSON, *J.*

19th.

Whether a man is insane or not, is a matter of fact; what degree of insanity will relieve him from responsibility, is a matter of law; the jury finding the fact of the degree too under the instructions of the court, murder can be committed only [by] a sane man; everybody is presumed to be sane who is charged with a crime, but when evidence is adduced that a prisoner is insane, and conflicting testimony makes a question for the jury, they are to decide it like every other matter of fact, and if they should say or conclude that there is uncertainty that cannot determine whether defendant was or is not so insane as to protect him, how can they render a verdict that a sane man perpetrated a crime, and that no other can?

Endorsed: Requested by defendant, and refused as not a correct statement of the law and improper in form.

DENSON, *J.*

20th.

If the jury believe from the evidence that defendant was not so insane at the time of the homicide as to be irresponsible for his acts, but that at the time he was laboring under such a mental unsoundness as to cause him to be easily aroused to a sudden heat of passion, and that he committed the homicide without malice aforethought, but on a sudden heat of passion, aroused and caused by an act [of] injustice towards him committed by deceased, it will be their duty to find him guilty of manslaughter only.

Endorsed: Requested by defendant, and refused as not correctly stating the law.

DENSON, *J.*

21st.

Although the jury may not believe from the evidence that defendant at the time of the homicide was suffering from such an unsoundness of mind as to be irresponsible for the act committed by him, yet the jury may take into consideration the state of defendant's mind at the time of the homicide in order to determine whether or not the killing was with malice aforethought, and therefore murder, or whether it was without any malice, and therefore only manslaughter.

Endorsed: Requested by defendant, and refused as not correctly stating the law applicable to the facts of this case.

DENSON, *J.*

22d.

A person in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts under similar circumstances, must have sufficient memory, intelligence, reason, and will to enable him to distinguish between right and wrong, in regard to the particular act done; that is, to know and understand it to be wrong, and that he will deserve punishment if he commit it.

Endorsed: Given at request of defendant.

DENSON, *J.*

23d.

If you believe from the evidence in this case that the defendant at at the time of the homicide was of unsound mind, and that the unsoundness consisted to so high degree that for the time it overwhelmed reason, conscience, and judgment, and that he committed the act from an irresistable uncontrollable impulse, you must bring in a verdict of not guilty, for an act to be punishable by law must be the act of a voluntary agent, and not the involun-

tary act of the body without the concurrence of the mind directing it.

Endorsed: Given at request of def't.

DENSON, *J.*

24th.

If you find from the evidence that the defendant committed the homicide charged, and that at the time of its commission he was in such a state of mental derangement that the law, as I have given it to you, will relieve him from responsibility for his act, but believe that his mental condition is now such that he is, or may hereafter become, a dangerous and unsafe person to be at large, you must, notwithstanding that fact, find him not guilty, for the law does not allow you, and it is not your duty to allow, the fact that he might probably, if he should be acquitted, kill and injure some other person, to in any way influence you in determining whether or not he is guilty of the crime charged.

Endorsed: Given at the request of defendant.

DENSON, *J.*

33 25th.

If you believe from the evidence that at the time of the homicide the defendant was actuated and controlled by an irresistible impulse so powerful as to overcome his will, and amount to temporary insanity, it will be your duty to acquit him.

Endorsed: Given at request of defendant.

DENSON, *J.*

26th.

If from the whole evidence the jury believe the defendant, at the time of the homicide, was laboring under such a defect of reason from disease of the mind as not to know right from wrong, in respect to the very act with which he is charged, it will be their duty to find him not guilty.

Endorsed: Given at request of defendant.

DENSON, *J.*

27th.

If the jury believe from the evidence that, at the time defendant shot the deceased, he was suffering from a mental disease by which, though he may have been quite aware that he was about to do wrong, his will became overpowered by the force of irresistible impulse, and his power of self-control was for the time de-
34 stroyed or suspended by such mental disease, it will be your duty to render a verdict of not guilty.

Endorsed: Given at request of defendant.

DENSON, *J.*

28th.

It is proper to take into consideration the condition of the de-

fendant's mind, and all the evidence in the case, either in finding the defendant guilty of any crime, or degree of crime, or in fixing any particular punishment for crime.

Endorsed: Given at request of defendant.

DENSON, *J.*

29th.

If the jury believe from the evidence, that defendant is, and for some time has been, subject to fits of insanity, and that the shooting the deceased was probably done by him during such a fit, he is entitled to be acquitted.

Endorsed: Given at request of defendant.

DENSON, *J.*

30th.

If, from the whole evidence, you believe that Mr. Hurtado killed the deceased, but at the time of doing so he was under the influence of a diseased mind, and was in reality unconscious that he was committing a crime, it will be your duty to find him not guilty.

Endorsed: This is not law, and is refused.

DENSON, *J.*

35 31st.

If the jury, from all the evidence in the case, have any reasonable doubt as to any issue in the case, either as to whether the homicide was committed by defendant, or whether he was sane and responsible at the time, the defendant is entitled to the benefit of that doubt.

Endorsed: Refused as not law.

DENSON, *J.*

32d.

If you believe from the evidence in the case, that defendant was insane at any time prior to committing the homicide, it will be your duty to presume that he was insane at the time of committing it, unless, from the evidence, you believe that he was sane at the time.

Endorsed: Refused, as not applicable to the evidence, and calculated to mislead.

DENSON, *J.*

33rd.

If the jury believe from the evidence, that defendant is guilty of either murder or manslaughter, but have a reasonable doubt as to whether the offence is murder or is manslaughter, it will be their duty to find him guilty of manslaughter only.

Endorsed: This instruction is fully covered by the charge given by the court of its own motion, and is, therefore, refused.

DENSON, *J.*

36 34th.

If the jury believe from the evidence that defendant is guilty of the crime of murder, but have a reasonable doubt as to whether the offence committed is murder in the first degree or murder in the second degree, it will be their duty to find him guilty of murder in the second degree only.

Endorsed: Refused because fully covered in previous instructions.

DENSON, *J.*

35th.

The law does not require that the insanity which absolves from crime should exist for any defined period of time, but only that it should exist at the time when the act was done with which the defendant is charged, and if from the evidence the jury are convinced that the defendant was insane but a short time before the homicide, they should presume him to have been insane at the time, unless the contrary is proven.

Endorsed: Given at request of defendant.

DENSON, *J.*

37 36th.

If you believe from the evidence, that at the precise moment of time that the defendant committed the act with which he is charged his intellectual powers were obliterated, even though but temporarily, it will be your duty to bring in a verdict of not guilty, for the reason, that if such be the fact, his acts were lacking in the intent necessary to constitute a crime.

Endorsed: Given at request of defendant.

DENSON, *J.*

37th.

If the jury have any reasonable doubt in the case, either in reference to the killing of Estuardo, or on the question of the sanity of defendant, the defendant should be acquitted.

Endorsed: Refused, not law.

DENSON, *J.*

38th.

If upon the whole of the evidence submitted to the jury there should be a reasonable doubt as to whether the defendant's guilt is satisfactorily shown, he must be acquitted, as no insane person can commit a crime, it necessarily follows, that if the jury have a reasonable doubt of the defendant's sanity, they must also have a reasonable doubt of his guilt. If you doubt his sanity, you doubt his guilt; and if you doubt his guilt, (if the doubt be a reasonable one,) you should acquit him.

Endorsed: Refused, not law.

DENSON, *J.*

38 38½.

It is proper for the jury to take into consideration the statement made to him of the seduction of his wife by the deceased as proper for you to consider in arriving at a conclusion as to whether he understands and was legally responsible for the killing, also to aid you in arriving at the conclusion as to whether the act was premediated or done with malice.

Endorsed: Refused, as not correctly stating the law.

DENSON, *J.*

38¾.

If you believe defendant in truth and in fact, when he killed deceased, believed deceased had seduced his wife, while it is in itself no excuse or sufficient provocation to excuse murder, if you believe he wholly understood and could control his act at the time of the homicide, yet it is proper for you to take into consideration, in arriving at the degree of murder, if any of which he may be guilty; also, it is proper for you to take such testimony into consideration in fixing the punishment, if you should find him guilty of murder in the first degree.

Endorsed: Refused, as not correctly stating the law.

DENSON, *J.*

39 Neither the seduction of the defendant's wife by the deceased, nor an adulterous intercourse between her and the deceased, will constitute an excuse or justification for his killing. The law provides the means and prescribes the mode of punisment of all who transgress, but never permits an aggrieved party to take the law into his own hands and avenge his real or supposed wrongs. The courts are open and free to all, and will, when appealed to, redress all wrongs; and it is the right and the duty of all persons suffering wrong at the hand of others to appeal to the tribunals of justice for their own redress or the punishment of the wrong-doers.

If a man is suddenly informed of a probable act of adultery between his wife and another man, or discovers the adulterers in the act, or in a situation to cause a reasonable man to believe they had committed adultery, and in the haste and excitement of hot anger or indignation slays the destroyer of his home, the law, in its tenderness for the weakness and passions of men, will mitigate his offense and punish him for manslaughter only; but if he has time for reflection, and after deliberation upon his wrong, determines to take revenge, and in pursuance of a deliberate and
40 premeditated intent, kills the seducer, he is guilty of murder of the first degree, and the adultery is no excuse or justification any more than would be any other real or supposed wrong constituting the basis of feelings of hatred and revenge.

Whether or not there was reasonable time for reflection is a question of fact for the jury to determine from the evidence and circum-

stances of each particular case. The law requires all men to subdue their passions and to overcome and suppress all impulses to avenge real or supposed wrongs, and allow such time for the blood to cool as would enable a reasonable and ordinary man to reflect and consider and to take a sober, second thought, and, if a man, after due time for reflection has elapsed, broods over his wrong and deliberately determines to slay the wrong doer, and does so, he is guilty of murder, no matter how grievous the wrong or outrage perpetrated upon him.

Malice is an essential element to constitute a homicide; murder and a killing without malice is not murder. The words malice and maliciously import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act. If the desire to vex, annoy,
41 or injure another person or the intent to do an act which is wrongful exists, it makes no difference whether such desire or intent is promoted by a sense of injury suffered or not if the accused has had sufficient time for reflection to enable the reason of an ordinary person to resume her sway.

Men must not yield to impulses of revenge or other evil passions, and, if they do, the legal penalty falls upon them. It is immaterial in this case whether adultery was actually committed by deceased and defendant's wife or not. Evidence of information given to defendant that improper conduct or relations had occurred between defendant's wife and deceased is to be considered only as affecting the question of defendant's mental condition.

To establish a defence on the ground of insanity it must be proved by a preponderance of evidence that at the time of committing the act charged the defendant was laboring under such a defect of reason from disease of the mind as not to know the nature or quality of the act; or, if he did know it, that he did not know that he was doing what was wrong, or if he knew that the act was wrong then that by the reason of the insanity he had not sufficient control of his will to resist the impulse to commit the act.

42 A defendant may be of unsound mind, as that term is usually understood, and yet be properly punishable for violating the law. A man's mind may be unsound in many respects, indeed, he may be a monomaniac upon any given subject, and yet his mind may be sound in all other respects. Such a man, though he may be quite capable of judging between right and wrong in regard to the act of which he may be accused, and though he may have sufficient will-power to resist, if he so desired, any impulse to commit the act could not be said to be possessed of a sound mind, yet, he would nevertheless be held responsible for the commission of a criminal act; except in a case where his unsoundness or monomania was involved, and where such unsoundness had some connection with the subject-matter of the prosecution.

Although it is true, as I have instructed you, that as to most questions involved in the case, the burden of proof is upon the prosecution, yet where insanity is relied upon as a defence, the law ad-

mits of a qualification of this rule. Where insanity is relied upon as a defence, the burden of proving the existence of such in-
43 sanity is in defendant; and it is incumbent upon him to establish, by a preponderance of evidence, that he was insane at the time of committing the act charged.

By the expression preponderance of evidence, I mean that upon your weighing all the evidence which has been given on this branch of the case, your minds are led to the conclusion that it is more probable that defendant was insane, than that he was sane at the time of the commission of the act with which he stands charged; in other words, that if the single issue of his sanity, or insanity, were submitted to you in a civil case, you would, from the evidence, find that he was insane.

In considering the evidence relative to the defence of insanity, it will be proper for you to remember that ordinary experience teaches us that the majority of men are sane, and consequently it is to be presumed until the contrary is proven by a preponderance of evidence that the defendant was sane at the time of the commission of the act with which he stands charged.

In conclusion, you are to pay no attention to what any other court or jury may have done; I have given you the law which must govern you in this case, and you are to render a true verdict upon the evidence in conformity to your oaths before God.

44 *Judgment.*

In the Superior Court.

STATE OF CALIFORNIA, *County of Sacramento.*

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOSEPH HURTADO, *Defendant.*

June 5th, 1882. Department No. 2. Hon. S. C. Denson, superior judge, presiding:

Convicted of murder of the first degree.

This being the day heretofore designated and appointed by the order of this court for the pronouncing and rendering of sentence and judgment against the defendant, Joseph Hurtado, upon the verdict of the jury heretofore rendered herein, now on this day comes the said defendant to the bar of the court in custody of the sheriff, and attended by his counsel, C. T. Jones, Esq., and also comes H. L. Buckley, the district attorney, who prosecutes for the people, when on motion of C. T. Jones, T. B. McFarland is entered of record as additional counsel, and defendant's motion for arrest of judgment, argued, submitted, and overruled, and denied by the court; and defendant's motion for a new trial, argued, sub-
45 mitted, and overruled and denied; exceptions to said rulings

reserved. The court proceeds to pronounce sentence upon the said defendant.

This being the day heretofore designated and appointed by the order of this court for the pronouncing and rendering of sentence and judgment against the defendant, Joseph Hurtado, upon the verdict of the jury heretofore rendered herein; now on this day comes the said defendant to the bar of the court in custody of the sheriff, and attended by Charles T. Jones, Esq., his attorney and counselor, and comes also Henry L. Buckley, Esq., the district attorney of the county, who prosecutes for the people, and moves the court to pronounce and render judgment of death, in accordance with the verdict of the jury. Whereupon the said defendant is informed by the court of the information filed against him by the district attorney of this county, charging him with the crime of murder in the killing of one Jose Antonio Stuardo, of his arraignment upon the said information, and his plea thereto of not guilty, of his trial, and conviction by the verdict of the jury of his own selection, by which he was found guilty of murder in the first
46 degree, and the order of the court fixing this day, as the time of rendering judgment upon said verdict, and is asked by the court whether he has any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged, or appearing to the court, why judgment should not be pronounced, the court proceeds to render the judgment.

It is therefore considered by the court here, and it is ordered, adjudged, and decreed, that he, the said Joseph Hurtado, be punished by the infliction of death, and that he be hung by the neck until he is dead; and it is further ordered and adjudged, that the said Joseph Hurtado be hence remanded into the custody of the sheriff of Sacramento, California, and that he be by the said sheriff securely and safely kept in close confinement until taken out in execution of this judgment; and it is further ordered, that a warrant of execution in due form of law be forthwith issued upon the judgment signed by the judge of this court and placed in the hands of the sheriff of the county of Sacramento, commanding him, the said sheriff, to execute the judgment in this case by hanging the said defendant,
47 Joseph Hurtado, by the neck until he is dead, on Wednesday, the 26th day of July, 1882, which day is hereby appointed as the day for carrying the judgment herein into execution.

Attest a true copy.
[SEAL.] THOS. H. BERKEY, *Clerk.*
By WM. B. HAMILTON, *Deputy Clerk.*

48 *Notice of Appeal.*

In the Superior Court, in and for said County.

STATE OF CALIFORNIA, *County of Sacramento.*

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOSEPH HURTADO.

To Henry L. Buckley, Esq., dist. attorney of Sacramento county, and attorney for the plaintiff in the above-entitled cause, and Thomas H. Berkey, Esq., county clerk, in and for said county :

You and each of you will please take notice that the defendant in the above-entitled cause, feeling dissatisfied hereby, appeal to the supreme court of the State from the final judgment of conviction, and from the order denying a motion for a new trial heretofore made on the fifth day of June, 1882, A. D., and from the whole thereof, and from all orders and judgments heretofore in said case made by said court adversely to defendant.

Respectfully,

T. B. McFARLAND AND
C. T. JONES,
Attorneys for Def't.

Endorsed: Service of the within notice of appeal by copy admitted June 21st, 1882. H. L. Buckley, dist. att'y, Sacramento county, and att'y for plaintiff. Filed June 21st, 1882. Thomas H. Berkey, clerk. By Chas. M. Coglan, deputy.

49 *Submission of Cause.*

In the Supreme Court, State of California. In Bank.

PEOPLE
vs.
JOSEPH HURTADO. } 10798.

1883. January 9th. Argues, and appellant allowed 20 days to file brief, respondent 10 days to reply; cause to be thereon submitted.

Title Court and Cause.

1883. February 15. Filed respondent's brief, and submitted.

Title Court and Cause.

1883. April 16. Filed petition for rehearing.

Title Court and Cause.

1883. April 24. Rehearing denied.

THE COURT.

50 *Judgment.*

In the Supreme Court of the State of California.

No. 10798. In Bank.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, *vs.* JOSEPH HURTADO, Appellant. } On appeal from the superior court in and for the county of Sacramento.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by McKinstry, J. We concur, Ross, J., McKee, J., Myrick, J., Sharpstein, J., Thornton, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Sacramento in the above-entitled cause be, and the same is hereby, affirmed.

51 *Opinion.*

In the Supreme Court of the State of California. In Bank. Filed March 28, 1863.

PEOPLE *vs.* HURTADO. } No. 10798.

Defendant was found guilty of murder in the first degree.

Two defenses were relied on at the trial. First, that defendant was laboring under insanity when the fatal shot was fired; second, that the killing was manslaughter only.

The wife of defendant testified, on his behalf, that she confessed to him, prior to the killing, she had been guilty of adultery with deceased, and that the confession was followed by great anger, weeping, and mental depression on the part of defendant. Defendant, having introduced evidence that a certain house in Sacramento was a house of ill-fame, offered to prove by a witness, one Cienfuegas, the independent fact that deceased had been seen entering the house in company with defendant's wife. The testimony would have tended to prove the adultery. The court below sustained the prosecution's objection to the testimony.

It is urged by appellant, the defendant, the evidence was admissible as corroborating the testimony of defendant's wife that she had confessed to her husband. No direct evidence was introduced by the people to contradict her statement that she had made the confession to her husband. We know of no principle which would permit defendant to strengthen or bolster up the statement of the witness, that she had declared to defendant she had committed adultery, by proving that, in fact, she had committed adultery. Evidence that she had committed adultery would not tend to prove

that she confessed to her husband she had committed adultery. It was her statement which could be claimed to be the cause, or one of the causes, which deprived defendant of his reason—not the truth of her statement, with respect to which he had no personal knowledge. It may be the presumption, to which she, in common with all other witnesses, was entitled, that she was telling the truth, and the further presumption that she would not swear falsely she had been guilty of adultery unless she was in fact guilty, were balanced or overcome in the minds of the jurymen by the probability she would swear falsely to save her husband from conviction. But we cannot assume that the jury arbitrarily, because she was the wife of defendant, rejected her testimony, or that they rejected it at all, since, if they accepted her statement as absolutely true, the verdict may be just. The credibility of each witness, not directly impeached, must be determined by the jury, and we must presume was in this case determined by the jury, upon consideration of the manner of the witness, the inherent probability of the testimony, and the other evidence in the cause, admitted because of its relevancy to the issues tried. To admit evidence in itself totally irrelevant, because it might in some degree render more probable testimony which is relevant, would be to open up the way to the trial of side issues not made by the pleadings. If it were competent for the defense to give evidence tending to prove that defendant's wife had committed adultery, it would be competent for the prosecution, in rebuttal, to prove that she had not committed adultery; in the case before us, to introduce witnesses who should swear that the house referred to was a house of good repute, or that defendant's wife never entered it. Moreover, it would have been competent for the prosecution, in the absence of evidence on the part of defendant tending to prove her adultery, to cast discredit upon her testimony, that she had confessed her guilt to her husband, by proving that she was entirely innocent. We are convinced the objection was properly sustained.

The court below refused the request of defendant to give the instruction following:

"If the jury believe from the evidence that the defendant was not so insane at the time of the homicide, as to be irresponsible for his acts, but at the time he was laboring under such a mental unsoundness as to cause him to be easily aroused to a sudden heat of passion, and that he committed the homicide without malice aforethought, but on a sudden heat of passion, aroused and caused by an act of injustice towards him, committed by the deceased, it will be their duty to find him guilty of manslaughter only."

The instruction was properly refused. If defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose.

To reduce the offense to manslaughter, the provocation must at least be such as would stir the resentment of a reasonable man.

It cannot be urged that the homicide is manslaughter because it was committed in an unreasonable fit of passion. In an abstract sense anger is never reasonable, but the law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person—one of ordinary self-control.

There was some evidence that defendant "lay in wait" for deceased. We cannot say, therefore, that the instruction in that regard was totally inapplicable and misleading.

Defendant excepts to the portion of the charge to the jury which reads: "If the defendant voluntarily killed the deceased, and you are satisfied from the evidence, beyond all reasonable doubt, of such voluntary killing, then it is your duty to convict him, unless you find from the evidence that the case comes within some one of the specifications of excusable or justifiable homicide." This language follows, and is a resumé of the instructions of the court with reference to unlawful homicide. The question of insanity is elsewhere treated of, and considering the whole charge, it cannot be presumed that the language of the court was understood by the jury to mean that the volition of an insane man rendered him liable to punishment. "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment, because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." (People *vs.* Doyell, 48 Cal., 93.)

Defendant asked the court to charge: "If the defendant had been told of threats made by deceased towards him * * * then defendant *had a right* to arm himself when he went to the police court," etc. The court properly refused the offered instruction. It was for the jury to determine from the evidence whether defendant was justified in arming himself and in using his arms.

On the application of defendant the deposition of one Lenora Beauteris—a witness too ill to appear in court—was taken on behalf of defendant. Defendant was not present when the deposition was taken. The witness was sworn by the clerk, and her testimony taken by questions, propounded by the respective counsel, and answers thereto. The deposition was introduced in evidence by defendant. Defendant now contends, in this court, that the judge below, of his own motion, should have excluded the deposition, and that his failure to do so was error, for which a new trial should be granted.

Defendant's proposition is that a deposition cannot be used in a case of homicide, because of section 13 of article 1 of the constitution of the State. The section reads:

"In criminal prosecutions, in any court whatever, the party ac-

cused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, where there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

The section, with the exception of the last clause, relates to the privileges of persons accused of crime. "In criminal prosecutions the party accused *shall have the right*," etc. He shall not be twice put in jeopardy for the same offense; he shall not be compelled to be a witness against himself, nor be deprived of life, liberty, or property "without due process of law." There can be little doubt that the right to due process of law would include the common-law right to be confronted by his witnesses. To prevent misunderstanding, however, the framers of the constitution added: "The Legislature shall have power to provide for the taking, *in the presence of the party accused* and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." It may be that, by reason of the exception, depositions cannot now be used *against* the defendant in cases of homicide, even although they are taken in the presence of the party charged with that crime, and with full opportunity for cross-examination. But in other cases the Legislature may authorize depositions to be taken on the part of the prosecution. Inasmuch, however, as the tenor of the provision of the constitution clearly shows—with the exception noted—that it was intended for the protection of defendants, there is no prohibition upon the power of the Legislature to authorize the taking of depositions by the *defendant* in every class of criminal cases. In this view of the question, it is not necessary to inquire how far the constitutional privileges accorded to defendants charged with crime may be waived by them.

A witness, Morrison, after testifying he had a conversation with the wife of defendant, said: "I told Joe (defendant) about the conversation I had with his wife, *in which she promised she would be good and do what was right.*" He was asked by the defendant: "State now the conversation you had with her." To this question the prosecution objected, on the ground that the question called for incompetent and hearsay testimony. The court sustained the objection. Counsel for defendant then asked: "Now state any conversation you had with her before she went away, in which she made any admission to you of her adultery with Estuardo." A like objection was sustained to the last question.

52 If the record showed that the witness had testified he had

communicated to defendant a conversation with his wife in which "she made any admission of her adultery" with deceased, we would be inclined to hold the court below erred in sustaining the objections to the questions. But the witness had only stated that he told defendant about a conversation in which "she promised she would be good and do what was right." It is manifest that any statement she may have made to the witness, not made known to defendant, could not have had any tendency to overthrow his reason.

Defendant asked the court to charge the jury:

"It is proper for the jury to take into consideration the statements made to him of the seduction of his wife by the deceased as proper for you to consider in arriving at a conclusion as to whether he understood and was legally responsible for the killing; also, to aid you in arriving at the conclusion as to whether the act was premeditated or done with malice." Also:

"If you believe defendant, in truth and in fact, when he killed deceased, believed deceased had seduced his wife, while it is in itself no excuse or sufficient provocation to excuse murder, if you believe he wholly understood and could control his act at the time of the homicide, yet it is proper for you to take into consideration in arriving at the degree of murder, if any, of which he may be guilty, also it may be proper for you to take such testimony into consideration in fixing the punishment, if you should find him guilty of murder in the first degree."

The court, in its general charge, said: "Evidence of information given defendant that improper conduct or relations had occurred between defendant's wife and deceased, it is to be considered only as affecting the defendant's mental condition."

The court also charged very fully with respect to the subject of insanity, in language as favorable to defendant as he was entitled to have used. (Charges asked by defendant, Nos. 7, 12, 17, 22, 23, 24, 25, 26, 27, 28, 29, 35, 36.)

We cannot say the action of the court in refusing the instructions above quoted demands a reversal of the judgment or a new trial. The first of the two instructions assumes that statements were made to defendant "of the seduction of his wife by deceased." While we would not always and necessarily hold a charge erroneous which should assume a fact to be proven, if from the immediate context, or elsewhere in the instructions, it appeared that the existence or non-existence of the fact was left to be determined by the jury, we will not say that the rejection of such a charge is erroneous. Moreover, the word "seduction" implies more than illicit intercourse between deceased and defendant's wife. A jury might well believe a husband would more probably be rendered insane by the act of one who should deliberately entice the wife from the path of duty—who should by arts and solicitation persuade her to sacrifice her chastity—than by her voluntary and unsolicited surrender of her person. It was for the jury to decide whether any statements were

made to defendant with respect to an adultery committed with deceased, and to decide whether such statements showed that she had been seduced.

Nor did the court err in refusing the last of the two instructions above quoted. If defendant "believed deceased had seduced his wife," (and retained the possession of his reason so as to be responsible for his act,) the circumstance might furnish a motive for the crime, but it could not of itself tend to reduce the crime to murder of the second degree, or, in other words, it could not tend to neutralize the effect of the circumstances which tended to establish that the killing was done with the express malice or predetermination to take life, which constitutes murder of the first degree. While any fact in evidence may be considered by the jury in fixing the punishment, where a defendant is found guilty of murder of the first degree, yet the court below was called on to give or refuse the offered instruction as a whole, and did not err in rejecting the whole when, as we have seen, part was objectionable.

Judgment and order affirmed.

McKINSTRY, J.

We concur—

ROSS, J.
McKEE, J.
MYRICK, J.
SHARPSTEIN, J.
THORNTON, J.

53 STATE OF CALIFORNIA, *County of Sacramento.*

In the Superior Court in and for said County.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs.
vs.
JOSEPH HURTADO, Defendant.

Defendants Bill of Exceptions on Appeal to the Supreme Court of the State of California.

Be it remembered, that on the 6th day of July, 1883, the superior court of Sacramento county, State of California, on application of the district attorney, made an order as follows: That it appearing to the court that the judgment in the above-entitled cause had never been executed, it was ordered that the defendant be in court on the 11th day of July, 1883, at half past one o'clock p. m. of said day, that a day for the execution of the judgment in said cause be fixed.

That pursuant to said order, on the day and hour therein named, the defendant in said cause, together with his counsel, Hon. A. L. Hart and C. T. Jones, Esq., appeared at the bar of said court.

54 The plaintiffs represented by Jno. T. Carey, district attorney of said county, and Grove L. Johnson, Esq. Whereupon in open court, Hon. J. W. Armstrong, presiding judge, told said defendant to stand up, and then and there informed him that the

judgment of death heretofore rendered in said cause had never been executed; that the defendant in said cause had appealed from said judgment to the supreme court of said State, and that court had, by its judgment, affirmed the judgment of this court, and the remittitur from that court in said case was on file in this court and entered of record, and that he was about then to fix the day for the carrying into effect and execution of said judgment, and asked said defendant if he had any legal reasons to urge why said judgment should not be executed, and an order then be made fixing a day for the execution of the same. Whereupon the defendant, by his counsel, made and filed in open court the following objections to the execution of said judgment, and to the court fixing a day for the execution of said judgment.

55 STATE OF CALIFORNIA, *County of Sacramento.*

In the Superior Court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOSEPH HURTADO.

Now comes defendant and objects to the fixing of any day for the execution of the alleged sentence in this action and to the execution of the said defendant, upon the grounds:

1st. That no verdict has ever been rendered in the said cause upon which any valid judgment or sentence could be rendered or entered.

2d. That under the constitution of California and the laws of said State the defendant is entitled to a trial and determination by a jury in all cases of homicide, and that in cases of murder in the first degree, before he can be executed, the defendant is entitled not only to be found guilty by the jury, but to a determination by the jury, in the exercise of a legal discretion, of the nature of the punishment to be inflicted.

3d. That in this case it does not appear whether it was the unanimous opinion of the jury that the defendant should suffer death or imprisonment for life, nor does it appear whether any or how many of the said jury were in favor of punishing the defend-
56 ant with death.

4th. That the verdict in this cause is incomplete and absolutely void, because the discretion in determining the punishment to be imposed upon defendant was not exercised by the jury, and it is not competent for any court or tribunal other than said jury to fix or determine the said punishment.

5th. That the alleged sentence of the court in the said cause is void upon its face and involves the attempted exercise of powers by the court which by the law are vested exclusively in the jury.

6th. That the punishment to be inflicted upon the defendant has never been in any manner determined by a jury or other com-

petent authority, and that therefore he cannot be legally executed, nor can any order for his execution be legally made by this court.

7th. That it appears upon the face of the judgment in this case that the defendant has never been legally, or otherwise, indicted or presented by any grand jury, and that he was proceeded against by information made and filed by the district attorney of the county of Sacramento after examination and commitment by a magistrate of the said county.

8th. That the said proceedings, as well as the laws and
57 constitution of California attempting to authorize them, and the alleged verdict of the jury and judgment of the said superior court of the said county of Sacramento, are in conflict with and prohibited by the fifth and fourteenth articles of amendment of the Constitution of the United States, and they are therefore void.

9th. That the said defendant has been held to answer for the said crime of murder by the district attorney of the said county of Sacramento upon an information filed by him, and has been tried and illegally found guilty of the said crime without any presentment or indictment of any grand or other jury, and that the judgment rendered, upon the alleged verdict of the jury in said cause, was and is void, and if executed, will deprive the defendant of his life or liberty without due process of law.

A. L. HART,
C. T. JONES,
Att'ys for Def'ts.

58 Endorsed: The People, etc., *vs.* Joseph Hurtado. Objections of defendant to fixing a day for the execution of the judgment, and to the execution of the judgment. Filed July 11th, 1883. Chas. M. Coglan, clerk; by W. B. Hamilton, dep. clerk; A. L. Hart, C. T. Jones, att'ys for def'ts.

And then and there, in support of said objections, offered in evidence the judgment roll and verdict in said cause heretofore rendered, made, and entered as follows:

59 STATE OF CALIFORNIA, *County of Sacramento.*

THE PEOPLE OF THE STATE OF CALIFORNIA
against
JOSEPH HURTADO.

In the Superior Court of the County of Sacramento, the 20th day of February, A. D. eighteen hundred and eighty-two.

Joseph Hurtado is accused by the district attorney of the said county of Sacramento by this information of the crime of murder, committed as follows: The said Joseph Hurtado on the — day of February, A. D. 1882, at the said county of Sacramento, in the said State of California, and before the filing of this information, did then and there willfully, unlawfully, felonously, and with malice afore-

thought kill and murder a certain human being, to wit, one Jose Antonio Stuardo, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

HENRY L. BUCKLEY,
District Attorney of Sacramento County,
in the State of California.

Subscribed to this 20th day of February, A. D. 1882.

60 THE PEOPLE OF THE STATE OF CALIFORNIA
against
JOSEPH HURTADO.

Information for murder presented in the superior court of the county of Sacramento, in the State of California, by the district attorney of said county of Sacramento, and filed as a record of said court, this 20th day of Feb., A. D. 1882, Thos. H. Berkey, clerk, by Chas. M. Coglan, dep. clerk; Henry L. Buckley, district attorney. Names of witnesses: Geo. K. Rider, Matt. Karcher, S. P. Doane, J. L. Wyatt, Jo. Cantrell, W. H. Baldwin.

61 FEBRUARY 27, 1882.

The defendant this day appears in person for arraignment, and gives his true name as charged in the information, and announces that he will employ his own counsel; and the information presented herein against said defendant being read to him, together with the endorsements thereon, and a copy thereof delivered to him, defendant asks and is allowed until March 6th, 1882, at 1.30 o'clock p. m., to plead.

Defendant this day appears in court with his counsel, C. T. Jones, and enters his plea of "not guilty" to the charge in the information herein, and case is set for trial March 22, 1882. Case continued until May 2d, 1882.

62 TUESDAY, *May 2d*, 1882.

Defendant appears in his own proper person to the bar of this court with his counsel, C. T. Jones. Also appears the district attorney, H. L. Buckley with G. L. Johnson, and W. A. Anderson, who prosecute for the people. Defendant announces himself ready for trial. Whereupon a jury of twelve men, lawful and true, were selected and sworn to try the case. The testimony of the people was then offered. Whereupon the defendant then offered his testimony, and the testimony being closed on each side, the case was duly argued and submitted to the jury with the instructions of the court, on May 6th, 1882, at 11.50 p. m., for their determination. Whereupon they retired and on Sunday morning May 7th, 1882, they came unto and return unto court and announce and declare the following as their verdict, to wit:

In the Superior Court of the State of California, in and for the County of Sacramento.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,
vs.
JOSEPH HURTADO, Defendant.

We, the jury in the above-entitled cause, find the defendant, Joseph Hurtado, "guilty" of murder of the first degree as charged.
RICHARD A. FISK, *Foreman.*

63 STATE OF CALIFORNIA, *County of Sacramento.*

In the Superior Court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
JOSEPH HURTADO, Def't.

JUNE 5TH, 1882.

Department No. 2. Hon. S. C. Denson, superior judge, presiding. Convicted of murder of the first degree.

This being the day heretofore designated and appointed by the order of this court for the pronouncing and rendering of sentence and judgment against the defendant, Joseph Hurtado, upon the verdict of the jury heretofore rendered herein.

Now, on this day, comes the said def't to the bar of the court in the custody of the sheriff, and attended by his counsel, C. T. Jones, Esq.; and also comes H. L. Buckley, the district att'y, who prosecutes for the people. When, on motion of C. T. Jones, T. B. McFarland is entered of record as additional counsel. And defendant's motion for arrest of judgment argued, submitted, and overruled, and denied by the court, and defendant's motion for a new trial argued, submitted, and overruled, and denied; exceptions to said rulings reserved. The court proceeds to pronounce sentence upon the said defendant. This being the day heretofore
64 designated and appointed by order of this court for the pronouncing and rendering of sentence and judgment against the defendant, Joseph Hurtado, upon the verdict of the jury heretofore rendered herein.

Now on this day comes the said defendant to the bar of the court in custody of the sheriff, and attended by Charles T. Jones, Esq., his attorney and counsellor, and comes also Henry L. Buckley, the district attorney of the county, who prosecutes for the people, and moves the court to pronounce and render judgment of death in accordance with the verdict of the jury. Whereupon the said defendant is informed by the court of the information filed against him by the district attorney of this county, charging him with the crime of murder in the killing of one Jose Antonio Estuardo, of his arraignment upon the said information, and his plea thereto of "not guilty," of his trial and conviction by the verdict of the jury

of his own selection, by which he was found guilty of murder in the first degree, and the order of the court fixing this day as the time of rendering judgment upon said verdict, and is asked by the court whether he has any legal cause to show why judgment
65 should not be pronounced against him, and no sufficient cause being alleged or appearing to the court why judgment should not be pronounced, the court proceeds to render the judgment. It is therefore considered by the court here, *and it is* and it is ordered, adjudged, and decreed that he, the said defendant, Joseph Hurtado, be punished by the infliction of death, *and that he be hung by the neck until he is dead;* and it is further ordered and adjudged that the said Joseph Hurtado be hence remanded into the custody of the sheriff of Sacramento, California, and that he be by the said sheriff securely and safely kept in close confinement until taken out in execution of this judgment; and it is further ordered that a warrant of execution, in due form of law, be forthwith issued upon this judgment, signed by the judge of this court, and placed in the hands of the sheriff of the county of Sacramento, commanding him, the said sheriff, to execute the judgment in this case by hanging the said defendant, Joseph Hurtado by the neck until he is dead, on Wednesday, the 26th day of July, A. D. 1882, which day is appointed as the day for carrying the judgment herein into execution.

Attest a true copy:

THOS. H. BERKEY, *Clerk.*
By WM. B. HAMILTON, *Dep. Clerk.*

66 Filed June 5th, 1882. Thos. H. Berkey, clerk; by W. B. Hamilton, dep. clerk.

Whereupon, after argument of counsel, the court overruled said objections, to which said ruling, and the whole thereof, defendant, by his counsel, then and there excepted; and then and there, after some remarks by defendant in person, said court made the following order and remarks: I have heard your remarks with a great deal of interest, and I believe that you are sincere in your statements and your feelings, and you have my full sympathy; I believe what you have stated that you have never been guilty of lying or perjury, or any of these things which mark dishonor, but the judgment has been rendered, and I am without any power or authority to set it aside. The only thing left for me to do is to specify the time when the judgment shall be carried into execution. The character of the judgment has been made known to you already. It is that you be confined in the county jail until the day which I shall fix, and that then you be taken by the sheriff of this county, and be hanged by the neck until dead. The time specified for the execution of the judgment is now fixed by the court for August 30th,
67 1883, between the hours of eight o'clock in the morning and six o'clock in the evening. In my opinion there is no hope of avoiding this sentence, and you should now labor under any

delusive hope. I advise you to make what preparations you may have to make to meet that awful doom we all must meet, whether upon the gallows or elsewhere. To which order the defendant, by his counsel, then and there duly excepted. That the above contains the only judgment and verdict ever rendered in said cause, and contains all the proceedings had at the time said order was made fixing the day for the execution of said judgment, and of said judgment overruling defendant's objections to said order.

Respectfully,

A. L. HART AND C. T. JONES,
Att'ys for Defendant.

The within bill of exceptions is correct, with this amendment: Strike out all after the word "order" on line 14, page 15, down to and including the word "aside" on line 22, same page; also strike out all of lines 5, and lines following to and including line 10, page 16, and we agree with this amendment that the same is correct, and be allowed.

68 JOHN T. CAREY, *District Attorney.*
C. T. JONES, *Attorney for Defendant.*

This bill of exceptions is allowed, and is correct.

JOHN W. ARMSTRONG,
Superior Judge.

69 Endorsed: The People, &c., *vs.* Joseph Hurtado. Defendant's bill of exceptions. Filed July 17th, 1883. Chas. M. Coglan, clerk. A. L. Hart and C. T. Jones, def't att'ys.

In the Superior Court in and for said County.

STATE OF CALIFORNIA, *County of Sacramento.*

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,
vs.
JOSEPH HURTADO, Defendant.

To John T. Carey, Esq., district attorney of, in, and for Sacramento county:

You will please take notice that on Saturday, July 21st, 1883, at 1½ o'clock p. m. of said day, we will move the Hon. J. W. Armstrong, judge of the above-entitled court, at his chambers, to settle and allow def't's bill of exceptions this day filed with the clerk of said court as a correct bill of exceptions as taken by def'ts in said cause.

Respectfully,

A. L. HART
and C. T. JONES,
Att'ys for Def't.

Sac'to, July 17th, 1883.

70 Endorsed: In the superior court. The People, &c., *vs.* Joseph Hurtado. Notice to settle bill of exceptions. Service ad-

mitted per copy of July 17th, 1883. John T. Carey, district attorney; by H. C. Pockman, dep'ty dist. att'y. Filed July 17th, 1883. Chas. M. Coglan, clerk. A. L. Hart and C. T. Jones, att'ys for defendant.

STATE OF CALIFORNIA, *County of Sacramento.*

71 In the Superior Court in and for said County.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs
JOSEPH HURTADO.

To John T. Carey, Esq., district attorney Sacramento county, and Grove L. Johnson, Esquire, attorneys for the plaintiffs in the above-entitled cause:

You and each of you will take notice that the defendant in the above-entitled cause, feeling dissatisfied, hereby appeals to the supreme court of the State of California from the order of the superior court of the county of Sacramento, State of California, and the judge thereof, duly made and entered in said cause on the 12th day of July, A. D. 1883, fixing the day for the execution of the judgment in said cause, and the orders made at said time overruling defendant's objections to said order and the whole thereof, which said order and orders were made after judgment in said cause, and affect the substantial rights of defendant.

Sacramento, July 28th, 1883.

Respectfully,

A. L. HART,
C. T. JONES,
Att'ys for Def't.

72 Endorsed: The People of the State of California *vs.* Joseph Hurtado. Notice of appeal from the order fixing the day for the execution of the judgment in said cause. Service of within notice accepted this July 28th, 1883. John T. Carey, district attorney, Sacramento county. Filed July 28th, 1883. Chas. M. Coglan, clerk. A. L. Hart, C. T. Jones, atty's for def't.

OFFICE OF THE COUNTY CLERK, COUNTY OF SACRAMENTO.

I, Chas. M. Coglan, county clerk of the county of Sacramento, State of California, and *ex officio* clerk of the superior court, held in and for said county and State aforesaid, hereby certify that I have compared the foregoing copy with the original defendant's bill of exceptions, and notice of appeal from order made after judgment of record, and filed in my office, and that the same is a full and true and correct copy of such originals, and of the whole thereof.

Attest my hand and the seal of said court, this 10th day of Aug., A. D. 1883.

CHAS. M. COGLAN, *Clerk.*

73 *Submission of Cause.*

In the Superior Court, State of California. In Bank.

PEOPLE
vs.
JOSEPH HURTADO, } 10867.

1883. Sept. 4th. Argues, and appellant allowed 10 days to file brief; cause to be submitted thereon.

Title Court and Cause.

1883. Sept. 12. Filed appellant's points and authorities, and submitted.

74 *Judgment.*

In the Supreme Court of the State of California. No. 10867. In Bank.

PEOPLE OF THE STATE OF CALIFORNIA, Respondents, *vs.* JOSEPH HURTADO, Appellant. } On Appeal from the Superior Court in and for the city and county of ———

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and siugular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the order fixing the day for the execution of the judgment of the superior court in and for the county of Sacramento in the above-entitled cause be, and the same is hereby, affirmed.

75 *Opinion.*

In Bank.

Filed September 18, 1883.

THE COURT.

PEOPLE
vs.
HURTADO. } No. 10867.

The ruling of the court overruling the objections of defendant to the order fixing the day of execution is not appealable.

Every question urged on the argument of this appeal was disposed of on the former appeal. Moreover, the verdict of the jury was sufficient and regular. (People *vs.* Welch, 43 Cal., 174.) And further, the provision of the constitution of this State as to the prosecution of criminal offenses by information (Sec. 8, Art. I) is not in conflict with the Constitution of the United States. (Kalloch *vs.* The Superior Court of the City and County of San Francisco, 56 Cal., 229.)

The order fixing the day for the execution of the judgment is affirmed.

In Bank.

76 In the Supreme Court of the State of California.

I, J. W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that the foregoing written pages numbered from one to seventy-five, both numbers inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said supreme court, this 18th day of October, A. D. 1883.

[SEAL.] J. W. McCARTHY, *Clerk.*
Per J. S. WILLIAMS, *Deputy.*

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Justices of the Supreme Court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between the People of the State of California, as plaintiff, and Joseph Hurtado, as defendant, a manifest error hath happened, to the great damage of the said Joseph Hurtado, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the office of the clerk of said Court at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of September, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[SEAL.] L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed, and it is further ordered that the execution of the judgment in said action be stayed until the determination of said action by the Supreme Court of the United States.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

Endorsed: United States Supreme Court. Joseph Hurtado *vs.* The People of the State of California. Writ of error. Filed Sept. 29th, 1883. J. W. McCarthy, clerk; per W. S. Leake, deputy. A. L. Hart, att'y for pl'ff in error.

78 In the Supreme Court of the State of California.

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, at the day and place within contained, as within we are commanded.

By the court:

[SEAL.] J. W. McCARTHY, *Clerk.*
Per J. S. WILLIAMS, *Deputy.*

79 In the Supreme Court of the United States of America.

Filed Sept. 29, '83. J. W. McCarthy, clerk supreme court. By W. S. Leake, deputy.

JOSEPH HURTADO, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendants in Error.

Assignment of Errors.

Plaintiff in error makes the following assignment of errors, to be annexed to the writ of error in this cause and returned therewith to the Supreme Court of the United States, viz:

1.

Section eight of article one of the constitution of California provides: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law. A
80 grand jury shall be drawn and summoned at least once a year in each county."

Sections 809, 888, 889, 949 of the Penal Code of California provide for, and purport to authorize, the trial of persons for capital and otherwise infamous crimes and felonies upon informations filed by the district attorneys of the several counties, and without indictment or presentment of a grand jury.

The supreme court of the State of California decided in said cause that the said provision of the constitution and said several provisions of the statutes of California were not repugnant to the 14th Article of Amendment of the Constitution of the United States, and the said decision is here assigned as error.

2.

That, in pursuance of the said provision of the constitution and

of the said several provisions of the statutes of California, referred to in assignment one, the plaintiff in error herein was tried in this cause in the State courts of said State for the crime of mur-
81 der, and was convicted of murder in the first degree, upon an information filed by the district attorney of the county of Sacramento, in said State, and without any previous indictment or presentment of any grand jury; that said cause was tried in the supreme court of the State of California, and in said trial there was drawn in question the validity of the said provision of the constitution and the said several provisions of the statutes of California, attempting and purporting to authorize trials for capital offenses and felonies without indictment or presentment of a grand jury, on the ground of their being repugnant to that clause of the 14th Article of Amendment of the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law;" that the decision of said State supreme court was in favor of the validity of the said provision of the constitution and said several provisions of
82 the statutes of California, and the said decision of the said State supreme court is here assigned as error.

3.

That the said supreme court of said State erred in holding and deciding that the trial of the plaintiff in error, for said offense, without the previous indictment or presentment of a grand jury, was a trial by due process of law within the meaning of the 14th Article of Amendment of the Constitution of the United States.

4.

That the said supreme court erred in holding that the courts of said State had any jurisdiction or power to try or convict said plaintiff in error without the previous indictment or presentment of a grand jury.

Plaintiff in error prays that the judgment of the supreme court of the State of California in said cause, and the judgment of the superior court of Sacramento county, State aforesaid, in said
83 cause, be reversed, and that said cause be remanded to the said State courts, with directions to dismiss the same and discharge the plaintiff in error from custody.

A. L. HART,
Att'y for Pl'ff in Error.

84 UNITED STATES OF AMERICA, *ss:*

To the People of the State of California, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, District of Columbia, on the first Monday of November, A. D. 1883, pursuant to a writ of error, filed in the clerk's office of the

supreme court of the State of California, wherein Joseph Hurtado is pliantiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, this 24th day of September, A. D. 1883, and of the Independence of the United States the one hundred and eighth.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

85 Due and legal service by copies of the within citation, writ of error, and assignment of error, with prayer, admitted this 28th day of September, 1883.

E. C. MARSHALL,
Attorney General of California.

Endorsed: United States Supreme Court. Joseph Hurtado *vs.* The People of the State of California. Citation. Filed Sept. 29th, 1883. J. W. McCarthy, clerk, pr. W. S. Leake, deputy.

Endorsed on cover: California Supreme Court. No. 1207. Joseph Hurtado, plaintiff in error, *vs.* The People of the State of California. Filed 12 November, 1883.

No.

In the Supreme Court

OF THE

UNITED STATES.

JOSEPH HURTADO,

Plaintiff in Error,

vs.

The People of the State of California.

BRIEF OF PLAINTIFF IN ERROR.

A. L. HART,

Attorney for Plaintiff in Error.

SACRAMENTO:
LEWIS & JOHNSTON,
LAW AND COMMERCIAL PRINTERS, 410 J STREET.
1883.

IN THE

Supreme Court of the United States.

JOSEPH HURTADO,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

In 1879, The People of the State of California adopted a new Constitution, in Section 8 of Article I of which it is provided:

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law. A Grand Jury shall be drawn and summoned at least once a year in each county."

In 1880 the Legislature of that State enacted Section 888 of the Penal Code, which provides:

"All public offenses triable in the Superior Courts must be prosecuted by indictment or information, except as provided in the next section."

Section 809 of the same Code, enacted in 1880, provides:

"When a defendant has been examined and committed, as provided in Section 872 of this Code, it shall be the duty of the District Attorney, within thirty days thereafter, to file in the Superior Court of the county in which the offense is triable, an information charging the defendant with such offense. The information shall be in the name of the People of the State of California, and subscribed by the District Attorney, and shall be in form like an indictment for the same offense."

Section 949 of the same Code provides:

"The first pleading on the part of the People is the indictment or information."

In pursuance of the foregoing provision of the Constitution, and of the said several sections of the Penal Code of California, the District Attorney of Sacramento County, on the 20th day of February, 1882, made and filed an information against the plaintiff in error, charging him with the crime of murder in the killing of one Jose Antonio Stuardo. Upon this information thus filed, and without any previous investigation of the cause by any Grand Jury, the plaintiff in error was arraigned on the 22d day of March, 1882, and upon his arraignment he pleaded not guilty of the charge contained in the said information. A trial of the issue thus made was thereafter had, and on Sunday, May 7th, 1882, the jury impaneled to try said cause rendered its verdict, in which it found the plaintiff in error guilty of murder of the first degree. (Trans., pp. 1, 2 and 4, fols. 1, 3 and 11.)

On the 5th day of June, 1882, the Superior Court of Sacramento County, in which the plaintiff in error had been tried, rendered its judgment upon said verdict, in which it was ordered and adjudged that the said Joseph Hurtado, plaintiff in error, be punished by the infliction of death, and the day of his execution was fixed

for the 20th day of July, 1882. (Trans., fols. 44 to 47.)

From this judgment an appeal was taken. (Trans' fol. 48.)

The Supreme Court of the State of California afterwards affirmed the judgment. (Trans. fol. 50.)

On the 6th day of July, 1883, the Superior Court of said County of Sacramento ordered that the plaintiff in error be in Court on the 11th day of July, 1883, at half past one o'clock P. M. of said day, in order that a day for the execution of the judgment in said cause should be fixed; in pursuance of said order, on the day and at the hour therein named, plaintiff in error in said cause, with his counsel, appeared at the bar of said Court, and thereupon the Judge of said Court commanded the plaintiff in error to stand up, and then and there informed him that the judgment of death theretofore rendered in said cause had never been executed, and asked him if he had any legal reason to urge why said judgment should not be executed, and why an order should not then be made fixing the day for the execution of the same. (Trans., fols. 53 and 54.)

Thereupon the plaintiff in error, by his counsel, objected to the execution of said judgment and to any order which the Court might make fixing a day for the execution of the same, upon the grounds:

7th. That it appeared upon the face of the judgment that the plaintiff in error had never been legally, or otherwise, indicted or presented by any Grand Jury, and that he was proceeded against by information made and filed by the District Attorney of the County of Sacramento, after examination and commitment by a magistrate of the said county.

8th. That the said proceedings, as well as the laws

and Constitution of California, attempting to authorize them, and the alleged verdict of the jury, and judgment of the said Superior Court of said County of Sacramento, were in conflict with and prohibited by the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and that they were therefore void.

9th. That the said plaintiff in error had been held to answer for the said crime of murder by the District Attorney of the said County of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of the said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered, upon the alleged verdict of the jury in such case, was and is void, and if executed, would deprive the plaintiff in error of his life or liberty without due process of law. (Trans., fols. 56 and 57.)

In support of said objections, plaintiff in error offered in evidence the judgment roll in said cause. (Trans., fols. 59 to 66.)

Thereupon, and after the argument of counsel, the Court overruled the said objections, and fixed the 30th day of August, 1883, between the hours of eight o'clock in the morning and six o'clock in the evening, as the time for the execution of the plaintiff in error. From this latter judgment the plaintiff in error appealed to the Supreme Court of the State. (Trans., fol. 71.)

On the 18th day of September, 1883, the Supreme Court of the State affirmed the said judgment, and rendered its opinion as follows:

"The ruling of the Court overruling the objection to the order fixing the day of execution, is not appealable. Every question urged on the argument of this appeal

was disposed of on the former appeal. Moreover, the verdict of the jury was sufficient and regular. (*People vs. Welch, 43 Cal. 174.*) And further, the provision of the Constitution of this State as to the prosecution of criminal offenses by information (Sec. 8, Art. I) is not in conflict with the Constitution of the United States (*Calloch vs. the Superior Court of the City and County of San Francisco, 56 Cal. 229*). The order fixing the day of execution is affirmed." (Trans., fols. 74 to 76.)

ASSIGNMENTS OF ERRORS.

1. Section 8 of Article I of the Constitution of California provides:

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A Grand Jury shall be drawn and summoned at least once a year in each county."

Sections 809, 888, 889, 849 of the Penal Code of California, provide for and purport to authorize the trial of persons for capital and otherwise infamous crimes and felonies on informations, filed by the District Attorneys of the several counties, and without indictment or presentment by the Grand Jury.

The Supreme Court of the State of California decided in said cause that the said provision of the Constitution, and said several provisions of the statutes of California, were not repugnant to the Fourteenth Article of Amendment of the Constitution of the United States, and the said decision is here assigned as error.

2. In pursuance of the said provision of the Constitution, and said several provisions of the statutes referred to in assignment one, the plaintiff in error herein was tried in this cause in the State Courts of said State for the crime of murder, and was convicted of murder in

the first degree, upon an information filed by the District Attorney of the County of Sacramento, in said State, and without any previous indictment or presentment of any Grand Jury; that said cause was tried in the Supreme Court of the State of California, and in said trial there was drawn in question the validity of the said provisions of the Constitution, and the said several provisions of the statutes of California attempting and purporting to authorize trials for capital offenses and felonies without indictment or presentment by the Grand Jury, upon the ground of their being repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty or property, without due process of law;" that the decision of said State Supreme Court was in favor of the validity of said provision of the Constitution and said several provisions of the statutes of California, and the said decision of the said State Supreme Court is here assigned as error.

3. That the said Supreme Court of said State erred in holding and deciding that the trial of the plaintiff in error for said offense, without the previous indictment or presentment of a Grand Jury, was a trial by due process of law within the meaning of the Fourteenth Article of Amendment of the Constitution of the United States.

4. That the State Supreme Court erred in holding that the Courts of the said State had any jurisdiction or power to try or convict said plaintiff in error without the previous indictment or presentment of the Grand Jury.

ARGUMENT.

The Laws and Constitution of California, which were designed to authorize the prosecution of capital cases and felonies, upon informations filed by the District Attorneys, without the previous investigation of the charge by a Grand Jury, and without a determination by that body of the existence or absence of probable cause for the prosecution of the same, are in conflict with and repugnant to that clause contained in the Fourteenth Article of Amendment of the Constitution of the United States, which provides:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The question presented by this proposition is one purely of definition. What was the meaning of the words "due process" of law, as applied to criminal cases amounting to felony, at the time they were adopted into the Fourteenth Amendment?

Indictment by a Grand Jury was an essential part of due process of law as applied to felony cases, at the time that phrase was adopted into the Fourteenth Amendment of the Constitution.

In support of this proposition, it is contended:

1. That the institution of a Grand Jury as a protection to the life or liberty of the subject can not be said to be a mere matter of formal procedure, and therefore within the exclusive control of the States, but it is a substantial protection against placing in jeopardy the life or liberty of an individual to gratify the malevolence of those in power or their favorites.

2. That the right to have his case heard and determined by a Grand Jury in all cases of felony, was one of the ancient common law rights of every subject of

Great Britain, and the establishment of that institution as a permanent barrier against the unjustifiable oppression of the citizen by the government, was one of the principal objects attained by the adoption of Magna Charta, in favor of the common people of that country.

3. That permanency and stability was given to that institution by the words "*law of the land*" used in the Great Charter, and that those words are synonymous with the phrase "due process of law" as used in the Fourteenth Amendment.

4. That the principles of the common law embracing its established modes of procedure and its securities to life, liberty and property, were adopted into and became the law of the American Colonies at the time of their organization, and that before the Constitutions of the General Government and of the several States were adopted, the determination of the Grand Jury before a person could be jeopardized, harassed and compelled to expend his fortune in his defense by being put upon his public trial, was essential as a part of the law of the land or due process of law secured to every English subject by the Great Charter.

5. That the Grand Jury system of England became a part of the common law of America, and was an essential part of the "due process of law" to which every person was entitled before there were any constitutional provisions upon the subject.

6. That the words "due process of law," as used in the Fourteenth Amendment, embrace the right to be indicted by a Grand Jury in felony cases before a man can be placed upon his public trial, and that amendment deprives the States of the power which they possessed before its adoption, to provide any system by which an

individual may be prosecuted for a felony until he has been examined and indicted by twelve of his peers.

It would seem that the establishment of the first of the foregoing propositions would require no argument other than a reference to the constitutional history of England and America. The pertinacity with which the English people adhered to their rights as against the Crown, confirmed to them by the Great Charter, is of itself sufficient to show the esteem in which these institutions were held after its adoption, and it seems that the rights of personal security, personal liberty and private property were the only ones which were guaranteed to the common people.

Mr. Reeves, in his history of the English law, says:

"As regards the great body of the Freemen, the common Freeholders, no doubt they appear to share in most of the principal clauses in the Charter in which they could be included—those relating to personal liberty and rights of property, etc. But the bulk of the Charter relates to feudal matters which concerned the Barons and Knights, who held by military tenure, and the only guaranty contained in the first great Charter consisted, in fact, as Guizot points out, in their own assumption of supreme powers; for it was provided by John's Charter that a select body of the most powerful Barons might, if *they* deemed the Charter to have been infringed, make war upon the King to compel its observance—*i. e.*, its observance according to *their* ideas, which was, as Guizot says, the right of civil war; and accordingly it led to civil war, which lasted, more or less, for many years, and in the result it is remarkable that a charter was obtained in several respects *less* favorable to the people than the *first*, and especially in the omission of the important provision that scutage should only be levied by consent of a Common Council of the realm, which contained in it the germ of a representative assembly, the effectual guaranty of popular liberty, at all events against the Crown." (*Reeve's Hist. of Eng. Law, 262, Note A, Vol. 1.*)

The great fundamental rights which were secured to the people by that famous instrument were those of security to life, liberty and property. The numerous cases occurring in the judicial history of England of public prosecutions instituted without probable cause, and based upon private malevolence and political obnoxiousness, necessarily led to a demand of the people that there should be some security against the oppressions of the Crown and its officers, secured to them by constitutional or fundamental law. Those instances are too familiar to require repetition, or more than a general reference to them.

This branch of the case, however, is well put by Mr. Justice Field in his very able charge to the Grand Jury in the Circuit Court for the District of California, given on the 22d day of August, 1872. In that charge the learned Judge says:

"The institution of the Grand Jury is of very ancient origin in the history of England; it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentators on the laws of that country that it was at first a body, which not only accused, but which also tried public offenders. However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name, until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the Crown.

"In this country, from the popular character of our institutions, there has seldom been any contest between the Government and the citizen, which required the ex-

istence of the Grand Jury as a protection against oppressive action of the Government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from Government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen, nor more than twenty-three, good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

"From these observations, it will be seen, gentlemen, that there is a double duty cast upon you as Grand Jurors of this District; one a duty to the Government, or more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge; and on the other hand, a duty to the citizen to see that he is not subjected to prosecution upon accusations having no better foundation than public clamor or private malice." (*2 Sawyer C. C. page 668.*)

And Mr. Blackstone, speaking upon the same subject, says :

"For so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the King, of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors:—that is, by twelve at least of the Grand Jury, in the first place, assenting to the accusation: and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial."

4th Blackstone's Com., side page 306.

The importance of the Grand Jury as a shield to the liberties of the citizen, as well as the esteem in which

that institution has always been held, is well stated by Proffatt in his work on jury trial :

"By many the uses and functions of the Grand Jury are extolled as the finest features of our administration of justice. Sir William Blackstone, as do many of our modern law writers, lauds it as the soul of English liberty. Bentham, and other writers, condemn the Grand Jury as deforming English judicial proceedings, whose publicity is their honest boast."

"But if sometimes the powers of the Grand Jury have been wrongfully used, they have more frequently been a shield to those unjustly accused, either by private malevolence or political intrigue. If the real theory of its powers and functions be carried out fully, no person can be publicly put on his trial for an infamous crime without first ascertaining if there be a prima facie case against him—such a degree of evidence as to his guilt as, unexplained, will be sufficient for a conviction. It is on account of this safeguard the institution is specially dear, and has been so strenuously upheld in English communities."

"The supreme regard in which the functions of the Grand Jury have been held in this country is very markedly exhibited in our constitutional history. Instances were too familiar where secret arrests, followed by imprisonment, were made either from private malice or political obnoxiousness ; but whenever this was done it was in flagrant violation of the provisions of Magna Charta, which expressly intended to check such an abuse. So impatient and jealous were the people in their efforts to secure the right to an examination by a Grand Jury, before an accused was publicly placed on trial, that the Constitution was in danger until, by the Fifth Amendment, their fears were quieted ; and then it was provided that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury;' with the usual exemption of maritime and military cases ; and this provision is, in almost similar terms, reiterated in our various State Constitutions. The substance and effect of such provisions are thus stated by Kent: 'No person, except on impeachment, and in cases arising in the mil-

itary and naval service, shall be held to answer for a capital or otherwise infamous crime, or for any offense above the common law degree of petit larceny, unless he shall have been previously charged on the presentment or indictment of a Grand Jury.'"

Proffatt on Jury Trial, Secs. 42 and 43.

Messrs. Thompson and Merriam in their recent work upon the subject of juries, substantially adopt the language of Mr. Justice Field heretofore cited, and say:

"It is frequently said that, in the struggles which at times arise in England between the powers of the King and the rights of the subject, the Grand Jury often stood as a barrier against persecution in the King's name, until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the Crown."

Thompson and Merriam on Juries, Sec. 475.

Upon the establishment of the American Colonies the common law of England, as is well settled, became the common law of the colonies, and it brought with it to the colonies the institution of the Grand Jury. The founders of the Republic, however, many of whom had fled from the mother country for the purpose of avoiding some of the persecutions which were still possible in England under its monarchial form of government, and notwithstanding the adoption of Magna Charta, were familiar with the history which had led to the adoption of the English charter of liberties, and hence, in order to avoid a repetition in this country of the scenes which had occurred in England prior to the adoption of the Great Charter, they met in Congress in 1774, and set forth by resolution a distinct claim to the protection to which every Englishman, as they asserted, was entitled under that statute. They unanimously resolved "that the respective colonies are entitled to the common law

of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." They further resolved that they were "entitled to the benefit of such of the English statutes, as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several and local circumstances."

They also resolved, that their ancestors at the time of their emigration were "entitled (not to the rights of man, of expatriated man, but) to all the rights, liberties and immunities of free and natural born subjects within the realm of England."

Journal of Congress, Declaration of Rights of the Colonies, Oct. 14, 1774, pages 27 to 31.

From this, it is evident that not only the English people in Great Britain, but those who colonized America, recognized the existence of the Grand Jury as a matter of substantial protection to the liberty and life of the subject as a matter of prime necessity. When, however, the colonies declared their independence and organized themselves into a government, strong objection was made to the original draft of the Constitution because it did not contain a special guarantee of this right of the citizen.

Story, in his work on the Constitution, speaking upon this subject says :

"But, although this provision of trial by jury of criminal cases is thus constitutionally preserved to all citizens, the jealousies and alarms of the opponents of the Constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this, further auxiliary rights ought to have been secured. These objections found their way into the State Conventions, and were urged

with great zeal against the Constitution. They did not, however, prevent the adoption of that instrument. But they produced such a strong effect upon the public mind, that Congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions, which appeared of most force; and these amendments were ratified by the several States, and are now become a part of the Constitution. They are contained in the Fifth and Sixth Articles of the Amendments, and are as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger, etc."

Story on Constitution, Vol. 2, Sec. 1,782.

It will be observed that in framing the amendment thus demanded by the people, the first right secured was that of indictment by a Grand Jury before a person shall be liable to prosecution for a felony, and from this it is apparent that this first right thus secured was recognized as being one of paramount importance. By this amendment, indictment by a Grand Jury, as an essential prerequisite to a prosecution for felony, is made by fundamental law one of the first essentials of the due process of law commanded by the Constitution in cases prosecuted in the Federal Courts; and the voice of the nation is added to the other proofs, going to the establishment of the fact that indictment by a Grand Jury is not a mere matter of formal procedure, but is understood to be a substantial protection to the liberties and rights of the citizen. In addition to this it should be remembered that each of the States which came into the Union after its organization as a government, and each of the original States, gave to the importance of this institution constitutional recognition by adopting and requiring it in their several fundamental laws. To

say therefore that the question as to whether a man, shall be prosecuted by indictment or information is one purely of formal procedure, is to deny the wisdom of the framers of all the original Constitutions of the States, and to controvert the result of the experience of all English speaking people who have lived under and experienced the results of the principles of the common law.

Matters of mere formal procedure are never made sacred by constitutional recognition, but are always provided for by the details of legislation enacted by legislative bodies. That Constitutions are declarations of fundamental principles, containing only the essential limitations upon legislative, judicial and executive power, is a proposition which needs but to be stated in order to receive an universal sanction. The reasons which induced the framers of the Constitution to attach so much importance to it, may be found in many cases recorded in English jurisprudence, and among others the case of the Earl of Shaftsbury. The forced submission of some of the judiciary and of the law officers, and as well sometimes of petit jurors who were compelled to sit and hear causes in public, to the commands of royalty, resulting in the most unjustifiable oppression of the citizen, had become at one time a matter of public notoriety in England, and led to the adoption of the Great Charter. In this country the fear of a repetition of some of the acts of judicial despotism recorded in the earlier history of English jurisprudence, induced the founders of the republic, in the framing of their organic law, to place such limitations upon the exercise of official power in all of the departments of Government as would prevent its abuse. Among other

things it was provided that the life or liberty of a person should not be twice put in jeopardy for the same offense; nor should it be once put in jeopardy without the previous indictment of a Grand Jury. It may be argued plausibly that if a man be guilty, it should matter but little to the Government whether one or many prosecutions would be necessary in order to compass his conviction. And with the same plausibility of argument it may be said that if a man be guilty, it matters little to the Government whether probable cause be first established by the investigation of the Grand Jury, or whether he be prosecuted at the option of the law officer of the Government upon an information filed by him. Both of these provisions of the Constitution were intended to secure the citizen in his private character and fortune against the oppressive prosecutions of Government. If a man be publicly prosecuted for an infamous crime, he becomes a man of doubtful character in the estimation of his neighbors, whatever may have been his previous standing in the community, let the result of the trial be what it may. If an information be filed against an individual, his defense, involving the employment of counsel, necessitates the expenditure of a part of his private fortune, whether there be any foundation for the prosecution or not. And, indeed, if a man be prosecuted for a criminal offense in times of public excitement and popular clamor, his life or liberty is in jeopardy, and a conviction may follow upon testimony which is palpably untrue, however slight it may be, even though he may be able to demonstrate his innocence beyond a reasonable doubt. These and other considerations are such as that the mere suggestion of them establishes to the judicial mind beyond contro-

versy that the Grand Jury system is a matter of substance and not of form, both as a matter of fact and, from a constitutional standpoint, as a matter of law.

It is true, as suggested by Mr. Justice Field in his charge to the Grand Jury, that in this country there has seldom been any contest between the Government and the citizen which required the existence of the Grand Jury as a protection against oppressive action of the Government; but while this is true it does not in any manner lessen the importance of the Grand Jury system in this country. The fact that there have been fewer instances of attempted abuse of power in this country than in some others is not due to any peculiarity in the nature of our people, but is due to the existence in the Constitution of limitations upon the exercise of official power, similar to that which is here contended for. Strike from the Constitution the provision which protects a man against a second jeopardy, and instances would soon be found when private malice would insist upon more than one prosecution of individuals for the same offense. Strike from the Constitution its provisions made for the protection of the people, and there would be nothing found in a democratic or republican form of government which would not equally exist in a monarchial form of government to prevent the abuse of official power. Thus it is said in Dawson's *Federalist*, page 581:

"The friends and adversaries of the plan of the convention, if they agreed in nothing else, concur at least in the value they set upon the trial by jury; or, if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the

more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed, useful or essential in a representative Republic, or how much more merit it may be entitled to as a defense against the operations of a hereditary monarchy than as a barrier to the tyranny of popular magistrates in a popular government. * * * Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses and arbitrary punishments upon arbitrary convictions, have ever appeared to be the great engines of judicial despotism."

If, however, by a fair construction of the language of the Fourteenth Amendment this right is secured to individuals charged with crime, it is a matter of slight importance, in the discussion of the subject, whether, in the minds of the judges whose duty it is to pass upon and enforce it, the right secured is one of procedure or one of substance. Such a question addresses itself to the political department and must have been determined by the people of the States, and the States themselves in their sovereign capacity, in the adoption of the provision. The right, therefore, in this instance could no more be construed away by denominating the system under which it is secured one of procedure, than could that similar right guaranteed by the express words of the Fifth Amendment in cases coming before the Federal Courts.

Nor would it be desirable to construe away this sacred right of the citizen even if it were possible; on the contrary every intendment should be indulged in favor of maintaining and perpetuating the safeguard thus thrown around life and liberty.

"Any and every innovation in the ancient and settled usages of the common law, calculated in any respect to weaken the barriers thrown around the liberty and secur-

ity of the citizen, should be viewed with jealousy, and trusted with caution. Aware, from the experience of the past, that the most dangerous and fatal assaults on the public liberty, have been perpetrated under the forms of law, and under the pretext of its vindication, the framers of our Constitution have interposed strong, and what they no doubt presumed adequate guards against such abuses. 'The people,' says the Declaration of Rights, 'shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things, shall issue without describing them, as nearly as may be, nor without probable cause, supported by oath or affirmation.' * * * * * Grand Juries are high public functionaries, standing between accuser and accused. They are the great security to the citizen against vindictive prosecutions, either by Government, or by political partisans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice."

Case of Lloyd and Carpenter, 3d Penn. L. J. Reports, pages 55 and 62.

Construction of statutory and constitutional provisions should always be in favor of personal liberty, and statutes authorizing arrests for alleged offenses should always be strictly construed, as against the Government.

Sedgwick on the Construction of Statutory and Constitutional Law, 223, note a.

The real question, therefore, is whether or not the words "*due process of law*," as used in the Fourteenth Amendment of our Constitution, must be construed to include the necessity of indictment before trial.

II.

THE RIGHT OF TRIAL BY INDICTMENT OF A JURY OF HIS PEERS WAS ONE OF THE ANCIENT PRIVILEGES OF THE COMMON LAW, SECURED AND MADE PERPETUAL IN ENGLAND BY THE WORDS "LAW OF THE LAND," AS USED IN THE TWENTY-NINTH CHAPTER OF MAGNA CHARTA, AND PERPETUATED IN THIS COUNTRY AND PLACED BEYOND THE PALE OF STATE LEGISLATION OR CONTROL, BY THE FOURTEENTH ARTICLE OF AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

That this right has existed in England for many centuries; that it did exist in that country at the time of the colonization of America by English subjects; that it was adopted into and became a part of the laws controlling the Colonies after the settlement of this country, and that, independently of legislation upon the subject, it has always existed in America as a common-law right, is a matter which cannot now be made the subject of serious debate.

Chitty says, speaking of indictment, that "it is the most constitutional, regular and safe, as well as by far the most usual mode of proceeding upon criminal charges." (*Chitty's Crim. Law, vol. 1, p. 161.*)

In addition to this mode of prosecution, men were sometimes prosecuted by presentment of a Grand Jury; sometimes upon the verdict of the Coroner's inquest, and sometimes in slander cases, where the defendant sought to justify and the fact was found against him, upon the verdict of the jury. But in all these cases it will be observed that a determination of the probable guilt of the defendant was first had by the deliberate judgment of twelve men.

Lord Erskine, in his celebrated speech upon the rights

of juries in relation to the subject under consideration, after having defined the rights of individuals to go at their option into the Courts and prosecute cases of a civil nature, said:

"But in criminal cases it is otherwise; the Court has no cognizance of them without leave from the people forming a Grand Inquest. If a man were to commit a capital offense in the face of all of the Judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the Supreme Criminal Court, but could only commit him for safe custody, which is equally competent to every common Justice of the Peace: The Grand Jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your Lordships as witnesses on the back of it. If it shall be said, that this exclusive power of the Grand Jury does not extend to lesser misdemeanors, which may be prosecuted by information; I answer, that for that very reason it becomes doubly necessary to preserve the power of the other Jury which is left." (*Erskine's Speeches, vol. 1, p. 275.*)

Hale, in his Pleas of the Crown, vol. 2, p. 151, says, that "in all criminal causes, the most regular and safe way, and most consonant to the statutes of Magna Charta, * * * is by presentment or indictment of twelve sworn men."

The institution is described by Mr. Blackstone as having been in existence prior to the reign of King Ethelred.

Chitty's Blackstone, vol. 2, book 4, top page 246, side page 302.

Indeed, the right of trial by indictment is described by all the authorities as being regularly allowed at the common law. It is true that informations were authorized, but those were confined to misdemeanors only.

The demand of the Colonists for all the privileges of civil liberty and rights of property that were secured to every Englishman by the common law included the right here contended for as one of the first and most important. The Congress of 1774, which by resolution made this demand, signified the estimation in which it held this right in a singular and very convincing manner.

"To the journal published by the order of Congress of 1774 and verified by the autograph of their secretary, is prefixed in the title page a medallion, representing magna charta as the pedestal on which was raised the column and cap of liberty, supported by twelve hands and containing the words "Hanc Tuemur, Hac Nitimur."

"The great popularity of the doctrine that the Colonists were co-heirs of liberty with the brethren residing in England, may be inferred from the complaint of the Royal Governor of New York in 1697, who thought it intolerable that not only the English emigrant, but the Dutch also should be 'big with the privileges of Englishmen and magna charta.'"

3 Bancroft, 56; Hurd on Habeas Corpus, 105 to 109.

That this principle of the common law became part of the laws of the Colonies is incontestibly true. No part of the laws of England could have been more suitable to the condition of the English subjects in this country—more applicable to their local necessities. It is therefore unquestionably true that if there had never been any legislation upon the subject in this country, the ancient principles of the common law and the doctrines of the 29th chapter of Magna Charta would have protected any individual from a prosecution for a felony until the case had first been passed upon by twelve of his peers.

At the time of the adoption of the Great Charter in

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At the time of the adoption of the Great Charter in

England, the requirement here contended for, was a part of the "law of the land" and the further security of the right of trial by indictment was one of the objects which led to the adoption of that charter, and was intended to be secured by the words "law of the land," as used in that instrument. That such is true is shown by the universal construction given to that statute ever since the day of its passage.

Thus, in speaking of the evils which that statute was intended to remedy, Mr. Reeves, in his History of the English Law, page 262, note a, says:

"In every county, however, there were a host of these feudal Barons and Knights, each with a fortress or castle, in which was a dungeon, and where the most abominable cruelties were perpetrated, without any possibility of aid from the law, except in the form of armed forces and a regular siege of the castle. Hence, in some instances, indeed, as in one very remarkable case in 1224, when one Falcon DeBreaute actually seized upon the King's Judges, and imprisoned them in his castle; Henry the III had to lay siege to his castle for two months with a strong force, in order to take it, and thus vindicated the law and rescued his judges. This single incident, which is narrated in all the chronicles under the year 1224, and occurred, be it observed in the year when the Charter was, for the third time ratified by Henry the III, will do much to illustrate the character of the age and the real nature of the Charter, especially, for instance, as to the remarkable stipulation put into the mouth of the sovereign in the cardinal clause,—the celebrated '*Nullus Liber Homo*' clause—which is so often quoted as the palladium of our liberties; '*Nec Super Eum Ibumus;*' that is, we will not come upon him with an armed force; '*Nisi Per Legem Terræ;*' that is, by the sheriff or his officers who would doubtless have been hung by such gentlemen as Falcon DeBreaute, over their castle walls, if they had dared to attempt to interfere with them."

Further on the same author, speaking of the common people, said :

"They, therefore, were not subject to these incidents of the feudal system, which afforded so many pretexts for oppression ; and the aggressions upon them were of a wholly different and more lawless character, which may be gathered pretty clearly from the chronicles and the Mirror ; violent seizures of their property, under color of distresses, or seizures of their persons to extort ransoms by imprisonment in the numerous castles, of which there were many hundreds."

Thompson, in his Essay on Magna Charta, page 229, also says:

"To be judged according to 'the law of the land' is the last privilege secured by the present chapter; which expression Sir Edward Coke interprets to signify the law of England, in its most extensive sense, binding both the sovereign and the subject, for which cause it is not written in the name of either. It also indicates that there are places and crimes to which this law does not extend, as to offenses committed upon the high seas, which belong to the cognizance of the Lord High Admiral. It likewise signifies, that none of the foregoing penalties were to be imposed, but after *due process of the Common Law.*"

"The constitutional right of an Englishman to demand that he shall not be put to trial upon a criminal charge, unless presented by a Grand Jury regularly returned to inquire into offenses, has undoubtedly saved from iniquitous prosecutions innocent persons, who otherwise would have fallen victims to the subserviency of the Crown officer in proceedings by information. The right is here stated in general terms. There can be no doubt that the indictment is 'the most constitutional, regular, and safe, as well as by far the most usual mode of proceeding upon criminal charges.'" (*Thompson and Merriam on Juries, p. 563.*)

It is unquestionably true therefore that the words "Law of the Land," as used in the English statutes, embraced and included an indictment by a Grand Jury

in criminal cases amounting to felony. It is also unquestionably true that at the time of the adoption of the terms "*due process of law*" into our Constitution, the settled usages and modes of procedure at the common law, as they had existed in England for centuries, and in this country ever since its organization, required that in such cases, before a man could be tried and condemned, he should be regularly indicted by twelve men.

Lord Coke, in defining the expression "*law of the land*," as used in Magna Charta, said "it means being brought in to answer according to the *old law of the land*." And this definition was universally and uniformly followed until the equivalent of that expression, "*due process of law*," was adopted into the several Constitutions, Federal and State, in this country. The construction thus given to the English Charter was the only reasonable one which could have been adopted. The object of the famous Twenty-ninth Chapter could only have been to secure beyond the possibility of official invasion, certain fundamental rights asserted by the people under the then existing laws of that commonwealth. Without such a purpose in view the celebrated "*Nullus liber* ~~homo~~ liberum" clause would necessarily have been fruitless of any beneficial result to the people. Without the construction given to that clause by Lord Coke, what "*law of the land*" would an English subject have been entitled to under the Great Charter? Any law which the legislative department of that government might see fit to pass? Such a construction as would produce such a result would defeat all of the purposes sought to be accomplished by that statute in favor of the common people, and would render the words

"*law of the land*," as therein used, a mere high-sounding and empty phrase.

It was in the definition of the words "*law of the land*" that the phrase "*due process of law*," as applicable to legal proceedings, was first used, and at that time the two expressions were defined as meaning one and the same thing.

Lord Coke said that the words "*per legem terræ*" "means by *due process of law*; that is by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law."

2 Inst. 50.

With this construction and definition of the two phrases, sustained by the united judgment of all commentators and Courts, the words "*due process of law*," "*due course of law*" and "*law of the land*," were adopted by the States respectively in their several Constitutions, and the former of those expressions was adopted into the Fifth Amendment of the Constitution of the United States.

Sedgwick on the Construction of Statutory and Const. Law, page 474, note 1.

These terms were introduced into the Constitutions of this country with their technical common law signification. (*Pennock vs. Dialogue 2 Peters, page 2; Sedgwick on the Construction of Statutory and Constitutional Law, page 223, note a.*

The provision of the Fifth Amendment is: "Nor be deprived of life, liberty, or property without due process of law."

Since the adoption of the foregoing provision there has been no deviation from the line of construction here contended for; and up to the time of the adoption

of the Fourteenth Amendment no question was ever made by any of the courts of this country, either State or Federal, as to the effect of the several provisions containing the phrase. It was conceded on every hand that the words "*due process of law*," wherever they were used in the Constitution of the nation, or of any State, were intended to and did secure to every individual the fundamental rights of trial according to the ancient principles of the common law.

Thus in *Murray's Lessees vs. The Hoboken Land and Improvement Company, 18 Howard, 276 and 277*, this Court said:

"The words 'due process of law' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' *in Magna Charta*. * * * * The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

The foregoing opinion of this Court served as the foundation of a doctrine which has been reiterated by

all the text-writers and State Courts which have spoken upon the subject since that time; a doctrine also which has never been overruled by any opinion rendered by this Court.

Kent, speaking upon the subject, says:

"And they must be regarded as fundamental doctrines in every State for the colonies were parties to the national declaration of rights in 1774, in which the trial by jury, and the other rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright. * * * The words 'by the law of the land,' as used originally in Magna Charta in reference to this subject, are understood to mean due process of law; that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, 'is the true sense and exposition of those words.'"

1 Kent's Com., Part IV., side page 13, 7th Ed., top page 612.

Storey, in his work on the Constitution, says:

"The other part of the clause is but an enlargement of the language of Magna Charta—*nec super eum ibimus, nec super eum mittimus nisi per legale judicium parium suorum, vel per legem terræ*—neither will we pass upon him nor condemn him, but by the lawful judgment of his peers, or by the law of the land.

"Lord Coke says that these latter words, *per legem terræ* (by the law of the land,) means by due process of law; that is without due presentment or indictment, and being brought in to answer thereto by due process of law; so that this clause in effect affirms the right of trial according to the process and proceedings of the common law."

In *Westervelt v. Gregg, 2 Kernan, page 209*, Edwards J., of the N. Y. Court of Appeals, delivering the majority opinion of the Court, said:

"The Constitution of this State declares 'that no person shall be deprived of life, liberty or property without due process of law.' * * *

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the Legislature may, in the uncontrolled exercise of its power, think fit to pass, is, in no sense, the process of law designated by the Constitution. This construction has heretofore been adopted (*Taylor v. Porter, 4 Hill, 140*); and it is so obviously sound, that the mere statement of it is sufficient. Its correctness cannot be made more apparent by argument or illustration."

In the same case, Denio, J., in a special concurring opinion, following the rule thus laid down, said:

"The act does not fall within the meaning of *due process of law*. That term, according to Lord Coke, means being brought in to answer according to the old law of the land. (*2 Inst. 50; and see, also, Taylor vs. Porter, 4 Hill, 140, and cases cited by Bronson, J.; 2 Kent's Com. 13.*)

"The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

2 Kernan, 212.

In *Green vs. Briggs, 1 Curtis*, (C. C.), the Court said:

"The exposition of these words ('law of the land') as they stand in *Magna Charta*, as well as in the American Constitutions, has been that they require 'due process of law,' and this is necessarily implied and included in the right to answer, to contest the charge, and the consequent right to be discharged from it, unless it is proved. Lord Coke, giving the interpretation of these words in *Magna Charta*, (*2 Inst. 50-51*), says they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto."

The same general doctrine is asserted and sustained in:

State vs. Statton, 6 *Caldw.* 234, 244;
Ervine's Appeal, 16 *Pa. St.* 256;
Parsons vs. Russell, 16 *Mich.* 129;
Bannina vs. Taylor, 16 *Pa. St.* 292.

In *Parsons vs. Russell*, Manning, J., in commenting upon a provision of the Constitution of Michigan, identical in its import and language with this clause of the Fourteenth Amendment, said:

"This constitutional provision is borrowed from *Magna Charta*, not the language, but the idea or principle. The phraseology is a little different, but the one great idea expressed is, that no one shall be deprived of life, liberty, or property, except in pursuance of law. The language of the Great Charter is, *by the law of the land*, which Lord Coke, in commenting on the charter, paraphrased *due process of law*. The two phrases therefore mean the same thing."

In the case of *McGinnis vs. State*, *9 Humphreys*, *43*, the Supreme Court of Tennessee said:

"What, then, was the common law mode of prosecution? Blackstone, in his Commentaries, vol. 4, 301, informs us, that 'this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former was either by presentment or indictment. The mode of prosecution, without a previous indictment, or presentment by a Grand Jury, 'to fix the authoritive stamp of verisimilitude upon the accusation,' is that of information. (*Id.*, *307*, *308*.) Informations, exhibited in the name of the king, are of two kinds: first, those properly his own suits, and filed *ex officio* by the attorney general; and, second, those in which, though the king is nominal prosecutor, are yet at the relation of some private person. The object of the latter, are 'any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an an atrocious kind.' And when an information of either kind was filed, it was tried by a petit jury of the county where the offense arose. And this mode of prosecution, according to the learned commentators, is as ancient as the common law itself. (*Id.*, *309*.) 'But these informations are confined, by the constitutional law of England, to mere misdemeanors only; for, whenever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men,

before the party shall be put to answer it.' (*Id., 310.*) From this brief view of the usual manner of prosecuting offenders at common law, it appears, for mere misdemeanors, persons might be put to answer, without presentment or indictment previously found by a grand jury, and that this was only for crimes, in the proper sense of that term, or felonious offenses, that it was indispensable that the accusation should be warranted by the finding of a grand jury, before the offender could be put to answer. When our ancestors removed to America, they brought with them this privilege, as part of the common law, and it has been incorporated, in substance, into the constitution of the United States, and perhaps all of our State constitutions.

* * * * * *

"In commenting upon this article, Mr. Justice Story says: 'The first clause requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer any capital and infamous crime charged against him. And this is regularly true, at the common law, of all offenses above the grade of common misdemeanors.'"

Indeed it may be safely asserted that at the time of the adoption of the Fourteenth Amendment the settled and universal construction of those terms throughout the Union was that they meant the right of every individual to a trial according to the ancient principles of the common law in all cases in which no other method of trial was pointed out by the Constitution itself; so that, in addition to the rule that technical words and phrases, when adopted into a Constitution, are understood to have been adopted with their contemporaneous construction, the doctrine of *stare decisis* might also be properly invoked. It is certainly true that the Congress which proposed that amendment understood the technical meaning of the words "*due process of law*," as defined by this Court and the leading text writers of this country, and intended to use them in that sense.

The object of the amendment was to limit the otherwise uncontrolled powers of the States. It is a matter of familiar history that the chief objection to the amendment was that its effect would be to interfere with the exercise of powers theretofore left exclusively to the States, and to vest in the Federal Government the right to restrain the States in the regulation of matters of local concern.

It is not denied that up to the time of the adoption of the amendment, matters of procedure in the State Courts were within the exclusive, unlimited and unrestrained control of State legislation; nor can it be denied, in view of the recent history of some of the States of this Union, that it was the arbitrary exercise of this unlimited power of legislation that led to the adoption of that amendment.

A study of that amendment, with its history, fully demonstrates that there were two central ideas that controlled the minds of the members of the Congress that proposed it—the one that there should be equality of right under the law, the other that there should be no arbitrary administration of the law. The first of these rights it was sought to secure by the "equality clause," which was intended to subject every man to the same general rules, without discrimination as to person or social condition. The latter of these rights was sought to be secured by the *due process* clause, which upon its face and by its very language, has reference only to procedure, or to the manner of determining rights in Courts of justice. To hold, as has been held in some of the State Courts, that the terms "*due process of law*," as used in the Constitution, were only intended to secure to every man the right to be heard in

a proceeding conducted according to general laws applicable to all alike, would not only destroy all of the purposes intended to be secured by that clause, and enable the Legislatures of the States to pass any kind of laws, providing for the most arbitrary proceedings, which they might deem wise, but it would also effectually destroy the efficiency of the equality clause by making the former subserve all of the purposes of the latter. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land.

Cooley's Const. Lim. 4th Ed. 437–440.

The particular clause under consideration, therefore, was intended to secure by constitutional guaranty that which was then understood to be "due process of law" in cases involving life and personal liberty. No words of the Constitution were used to point out what particular things in a criminal trial were intended thus to be made sacred, but it was certainly intended to secure those fundamental rights which had so long been understood to be the chief protectors of the subject against the encroachment of official power. It will be observed that the Federal Constitution does not by express language secure a person against an arrest by State authority without a warrant, nor does it secure to him by express language the right to be informed of the nature of the offense, to a speedy trial; the right to appear by counsel, or to trial by jury, and yet no one would dare to deny that these things are secured by the Fourteenth Amendment, because they constituted a part of due process of law at the time of its adoption.

The principle of protection—the fundamental right which it is here claimed was secured by the English

system and also by the common law system of America, was the right to have twelve men, sworn to determine according to the law and the fact, pass upon the question as to whether or not the defendant should be put upon his trial before the prosecution could be made public, and the liberty and life of the citizen submitted to the jeopardy of a final trial. It is conceded that whether or not the instrument upon which he shall be tried shall be called an *indictment* or whether or not the body of men making the preliminary investigation shall be denominated a Grand Jury, is a matter which may be regulated by legislation; and the form of the indictment, as well as the forms to be pursued in obtaining the previous determination of the requisite number of qualified men might be materially modified if not entirely changed. The right secured is an essential part of the trial by jury. It consists in the proper restraint of judicial and executive power in all cases in which the life or liberty of the subject is involved until the sanction of twelve of the common people shall have been obtained. With this right secured it is conceded that no objection could be made to forms and modes of procedure adopted by government for its exercise, so long as those forms and modes of procedure did not operate to destroy the right itself.

The position here taken is well illustrated by the Supreme Court of Mississippi in a well considered case.

The due process clause of the Constitution "refers to certain fundamental rights which that system of jurisprudence of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property then the deprivation would not have been punished by 'due course of law.'" * * *

"Although the Legislature may, at its pleasure, pro-

vide new remedies, the power is nevertheless subject to the condition that it cannot, by a new formula, overthrow ancient and fundamental rights, which have been respected and observed in judicial procedures."

Brown et al. v. The Board of Levee Commissioners, 50 Miss., pages 479, 487.

So too it is said in a note to Cooley's Constitutional Limitations, page 355, note 2:

"What is meant by 'law of the land?' In this State, taking as our guide Zylstra's case, 1st Bay, 384; White vs. Kendrick, 1 Brav. 471; State vs. Coleman and Maxey, 1 McMull, 502, there can be no hesitation in saying the words mean the common law and the statute law existing in this State at the adoption of our Constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to consider himself amenable for all time to come. Per O'Neill, J., State vs. Simons, 2 Spears, 671–7. See also State vs. Dougherty, 60 Maine, 509. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied and which protected private rights were not departed from."

So also in the case of *Jones vs. Robbins, 8th Gray, 344*, it is said that "the right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a Grand Jury in case of high offense, is justly regarded as one of the securities of the innocent against hasty, malicious and oppressive public prosecutions, and is one of the ancient immunities and privileges of English liberty."

In South Carolina the same doctrine has been substantially upheld. "If the law may abridge the trial by jury, it may also abolish it, and this great privilege

would be held only at the will of the Legislature. But when we consider the true import of these words, and allow them the construction which all the commentators upon Magna Charta (from whence they are taken) have concurred in giving them, they will then be found to afford a real security to the citizen for the preservation of this right, and to become an effectual bar to the innovations of the Legislature."

Zylstra vs. The Corporation of Charleston, 1 Bay's Rep. (S. C.) p. 391.

The State ex rel. Coleman vs. Maxcy et al. 1 McMull. Rep. (S. C.) p. 502.

The true doctrine therefore is that all remedies may be provided and amended by State legislation, so long as they do not abridge or destroy those fundamental rights of the citizen which have been enjoyed for centuries and recognized as the main pillars of individual liberty. The right in this case is to have twelve men pass upon the probable guilt or innocence of the defendant before he shall be put to the danger of a public trial.

Stephen and De Lobme on the British Con., vol. II, page 774.

The remedy, which is the subject of State legislation, is the means to be provided by law by which that right shall be secured. The former is taken from the control of the Legislature by the Constitution, while the latter is to be provided in such manner as the Legislature may direct.

"The idea of a people, through their representatives, making laws, whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any

Government where freedom has a name. Such abuses resulted in the adoption of Magna Charta."

Vanzant vs. Waddell, 2 Yerg. (Tenn.) 270–271.

If this right is not one of those which was secured by the Fourteenth Amendment, where are we to look for those that were so secured, and what reason is there for distinguishing between this and others than which this is not less sacred? What rights are secured under this clause of the Constitution to a person who is prosecuted in a case in which his life or liberty is involved? The same reasoning which would give to a State, notwithstanding this provision of the Constitution, the right to set aside and disregard this institution, would also necessarily concede to the State the same power to abolish the right of trial by jury, and as well also the right of the defendant to be informed of the charge against him before he could be put upon his trial. If, notwithstanding the amendment, these rights may be taken from the citizen, it is evident that the words "due process of law," as used in that amendment and applied to the protection of life and liberty, are useless and meaningless.

Mr. Pomeroy, in his work on Municipal Law, second edition, Section 624, says:

"But our organic law guards the life of an individual not only against the attacks of those not clothed with legal authority, but against the unwarrantable power of the State itself."

"The corner stone of this muniment is the provision that no person shall be deprived of life, liberty or property, without due process of law; and this is further defined by the Constitution and the Courts to consist in the following necessary elements: a presentment or indictment by a Grand Jury; an arrest by virtue of a warrant issued upon oath, and containing a description of the crime charged; information of the nature and

causes of the accusation; a speedy trial before an impartial jury, etc. This is due process of law. Nor can the United States, nor any particular State, take away from these bulwarks, built up around the life of every person, even when it was put in danger on account of some alleged offense against the majesty of the State and the peace of society.

"The words 'law of the land,' used in Magna Charta, and 'due process of law,' employed in our Constitution, are identical in their import. They do not mean any law which the Legislature may see fit to pass, but that common law course of judicial proceedings known in England for centuries, and recognized and described by our organic law, and sketched above. Neither a State Legislature nor the National Congress can, by enacting a new method of trial, thereby make it the 'law of the land,' or 'due process of law.'"

Mr. Bishop also, in his recent edition of his work on Criminal Procedure, suggests his serious doubts as to the power of the States to interfere with the principle of the Grand Jury system since the adoption of the Fourteenth Amendment. He says:

"Where the attempt is made, as in some of the States it is, to employ the information in felony and capital cases, a question of constitutional right arises. The Fourteenth Amendment of the Constitution of the United States, adopted in 1868, provides, that 'no State shall deprive any person of life, liberty, or property without due process of law;' and there is a like provision in the Constitutions of some of the States; now

"This provision is similar to one in the 29th Chapter of Magna Charta, which in full is as follows: "No freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we not pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer

to any man either justice or right. The words 'law of the land' were expounded as synonymous with 'due process of law,' and as securing to the individual those fundamental rights of trial, which previous usage had established. And there is room for doubt, whether, under this provision in the United States Constitution, or a like provision in a State Constitution, the Legislature can authorize a trial for felony, without indictment, contrary to the established course of the common law. The Wisconsin Court has held that it can; but it is not probable the question will escape further agitation."

Bishop on Crim. Procedure, 3 Edition, Sec. 145.

The rule thus stated comports with the general rule of construction, that, "technical legal terms, as a general rule, and in the absence of any countervailing intent, which displaces the rule, are to be taken in their established common law signification."

Sedgwick on the Construction of Statutory and Constitutional Law, page 223, note a.

The opinions of the State Courts, which have taken a different view of this subject, were based wholly upon the definition given by Mr. Webster in the Dartmouth College case, viz:

"By the law of the land, is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. It means that every citizen shall hold his life, liberty, and property under the protection of general rules, which govern society."

The difficulty of accepting this general definition as the one which shall control the rights of individuals in all kinds of proceedings in courts of justice is that, while it states a general proposition which is true in all cases, it does not undertake to define that which in particular cases would be considered an appropriate hearing. As has been said by this Court, there can be

no general rule stated which shall specifically define the things that are essential to due process of law, and which shall at the same time be applicable to all kinds of cases. It would perhaps fully meet the requirements of due process of law, as defined by Mr. Webster, if the State should provide by general law that all persons should be subject to be tried and condemned by the judgment and determination of a common Justice of the Peace without the aid of a jury; it would be equally a compliance with that definition of the term if in such a trial the defendants were allowed to be heard, but were denied the right to be heard by counsel and the right to confront his witnesses. It is unquestionably true that every man has a right to be heard before he is condemned, in a tribunal which proceeds upon inquiry and renders judgment only after trial; but the manner in which this hearing thus secured by the Constitution is to be had, must be regulated by the nature of the case and the principles of law which have always governed causes of a similar nature. The particular procedure to which a party is entitled in the different classes of cases must, as this Court has said, be determined by the process of exclusion and inclusion, and in each instance, that must be determined to be due process of law which came within the definition of that term as applied to the particular case, when this limitation was put into the Constitution. To hold that a system of laws by which every citizen is enabled to hold his life, liberty and property under the protection of general rules which govern society, is due process of law — is to give to the States the same arbitrary powers which might have been exercised by them in this respect before the Constitutional amendment was adopted. A

general law applicable to all persons in the State which should provide that a man should be tried in secret, before a judge of absolute and final power, without the aid of counsel, without the right to confront his witnesses, without the right of trial by jury, and without the right to be informed of the nature of the charge against him, would be due process of law within the meaning of such a definition. Indeed such a construction would leave in the States Governments the power to make any law "*due process of law*," subject only to the condition that it should be general in its nature and operate upon all alike. It is evident, however, that such was not the intention of the framers of the amendment. The intent clearly was to limit the otherwise unrestrained power of the State over the life and liberty of its subjects; to prevent the State from providing by law for arbitrary modes of trial, whether by general law or special enactment; to uphold and forever maintain with the inflexible arm of the Constitution those fundamental rights transcribed from the British laws, which have so long been recognized as the chief safeguards of the common people against the intemperate exercise of official power.

At this time in California the only thing left to protect the individual against the loss of reputation and jeopardy involved in a final and public trial for an infamous offense, at the option of a hostile public prosecutor, is the determination of a common Justice of the Peace, whose subserviency to the District Attorney is not only possible, but has already been remarked in many instances. And thus one by one will the old landmarks of personal security and civil liberty be swept away by our people, whose estimate of their value

is formed upon but a slight reading of the reasons which, in remote times, pointed so forcibly to their necessity, unless they are prevented and restrained by the organic law of the Nation.

The first duty of every free government, as well through its judicial as its executive and legislative departments, should be to uphold and foster those institutions which experience has demonstrated are essential barriers against the oppression of its people.

"In a government professing to regard the great rights of personal liberty and property, and which is required to legislate in subordination to the laws of England, it would not lightly be presumed that the great principles of *Magna Charta* were to be disregarded. * * * * * The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. * * * * * The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

Wilkinson vs. Leland, 2 Peters, 655.

The provision of the Constitution under consideration was intended to *prevent* the people from parting with such rights. The construction of it here to be had must last for all time to come. That construction should lean towards maintaining personal liberty, and, if possible, be made to support ancient fundamental rights, (*Elam vs. Rawson, 21 Geo. 139*); for it would be better that the plaintiff in error, and all other persons charged with crime, should be subjected to another trial, conducted in accordance with established rights and the requisite legal formalities, than that so important a shield to the citizen should be construed out of the Constitution. In times of war and public excitement and clamor, when the fears of the people are

aroused, they may be trusted in a popular government to attend to the protection of their own rights; but in times of peace it is to the judiciary and other heads of departments that the people must look for the preservation of their liberties.

A State should not be permitted, for trivial reasons, to part with institutions founded upon the experience of ages, and originally granted to the people for their self-protection; their rights in this respect have been placed under the shield of the fundamental law of the nation, and by its wise restraints they must be protected against the hasty innovations upon ancient rights which may be devised by local statesmen. To prevent such is the object of all limitations in the national constitution upon the exercise of State power.

It is submitted that it is not competent for the States to authorize the trial of men for capital offenses, without also providing for the examination of the case by a body of men corresponding to, and exercising the functions of the English Grand Jury, and for this reason the judgment of the State Court should be reversed.

A. L. HART,
Attorney for Plaintiff in Error.

110-576

No.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JOSEPH HURTADO, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Brief of Defendant in Error.

JOHN T. CAREY, District Attorney, representing
Hon. E. C. MARSHALL, Attorney-General.

SACRAMENTO:
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1884.

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BRIEF OF DEFENDANT.

I.

The facts are for all purposes fully and fairly stated in plaintiff's brief.

II.

The question presented for determination is: Is Section 8 of Article 1 of the Constitution of the State of California and the penal procedure thereunder adopted by the Code of that State, in violation of and inhibited by Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States?

Still narrowed down, does the phrase in said section, to wit: "nor shall any State deprive any person of life, liberty, or property without due process of law," as applied to criminal procedure, prohibit the States from accusing and prosecuting the accused for capital, infamous, and other felonious crimes without presentment or indictment by a grand jury?

The first inquiry that suggests itself is the phrase

"due process of law" used anywhere else in the Constitution, and if so, what is its meaning? The answer is, we find it in the Fifth Article of Amendment to the Constitution of the United States.

It is contended by plaintiff in error that, as used in the Fourteenth Article of Amendment, it is convertable with the expression "unless on the presentment or indictment of a grand jury."

But in the Fifth Article of Amendment the expression "due process of law" is used with relation to the other expression "unless on the presentment, etc.," and as that article is an enumeration of certain rights reserved to the people, it is evident one of the rights there enumerated, being that "no person should be held to answer" * * * "unless on presentment or indictment of a grand jury," that the phrase due process of law following in the same article did not mean the same thing. If "due process of law" included this right, and all the others enumerated in the same article before that expression, then the preceding part of the article is surplusage and mere verbiage.

Then if "due process of law" in the Fifth Article of Amendment does not mean "unless on presentment or indictment of a grand jury," why should it be given such a meaning or construction as it appears in the Fourteenth Article of Amendment. Is there anything in the fourteenth article rendering such a construction warrantable?

Is it not more rational to conclude that the people or the States adopted and accepted it with the meaning and construction that it had in the Fifth Article of Amendment, that it had received by the judiciary and law writers?

III.

The Fifth Article of Amendment to the Constitution of the United States has repeatedly been held to be

restrictions upon the Federal Government, and not on the States.

Edwards vs. *Elliott*, 21 Wall. 557.
Barron vs. *Baltimore*, 7 Peters, 243.
Twitchell vs. *Conn*, 7 Wall. 321.

And a long line of authorities needless to cite, because it is no longer a disputed question.

Now, would it be contended that it would not be competent for Congress to dispense with the intervention of a grand jury in criminal cases other than those capital or otherwise infamous? It seems to me there can be no question but that this restriction is full, plain, and explicit, and by enumerating the cases in which the people reserve the right not to be accused only on presentment or indictment of a grand jury for capital and otherwise infamous crimes, clearly implies the power of Congress to dispense with the grand jury in all other cases.

Rules of construction require us to construe the whole instrument together as one, and as though all was adopted at one time. They further require us when endeavoring to determine the meaning of a word or a phrase "to compare them with other words and sen- " tences in the same instrument; that illustration may " be further derived from the subject-matter in refer- " ence to which the expressions are used."

Potter's Dwarris, p. 665, chap. 19.
Story on Constitution, chap. 5, Par. 400, 4th ed.

This, it seems to me, must aid us very much in arriving at a correct construction of the phrase "due " process of law" as used in the Fifth Article of Amendment. If it has any meaning peculiar to itself and of itself, if it secured any right to the people as against the General Government, then it must have been some right, some privilege and immunity not

secured anywhere else in the Constitution to the person or subject.

But another familiar rule of construction is that every word, and every phrase, and every expression in the Constitution or instrument to be construed must be given a meaning, a place in the construction of the whole.

Applying these principles, the phrase "due process of law" does not mean the right to be accused by a grand jury, the place of trial of the accused, the right to have assistance of counsel, to a speedy and public trial, to be informed of the nature of the accusation against him, to be tried by an impartial jury, nor the right of trial by jury in civil cases, because all these rights were and are reserved in express terms by Articles 5, 6, and 7 of Amendments to the Constitution of the United States, and all were submitted to, considered, and adopted at the same time by the people; but does mean there shall be judicial proceedings where life and liberty are concerned, in pursuance of law, before a proper tribunal in its regular course of administration through Courts of justice (2 Kent's Com. 13), a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial, a law which secures the individual from the ARBITRARY exercise of the powers of government.

Although the Fourteenth Article of Amendment was adopted and became a part of the Constitution long after the amendments *supra*, yet the expression "due process of law" used in it must be construed by the light of the whole instrument, and, therefore, did not mean "unless on presentment or indictment of a grand jury," for reasons before mentioned.

IV.

It is another familiar principle of construction that

words and phrases must be given their usual meaning as commonly understood.

Story on Const., Vol. 1, p. 333, Par. 451, 4th ed.

In exact language Story says: "In the first place "then, every word employed in the Constitution is to "be expounded in its plain, obvious and common sense "(meaning), unless the context furnishes some ground "to control, qualify, or enlarge it."

Again the same author, Par. 453: "In the next place "where technical words are used the technical mean- "ing is to be applied to them, unless repelled by the "context. But the same word often possesses a tech- "nical and a common sense. In such a case the latter "is to be preferred. * *"

The author illustrates by the use of the phrase "habeas corpus," that when it appears it means what is commonly understood as a writ to free a party from arbitrary imprisonment, and not every sort of a writ that has acquired that name. Hence we submit on like principles of construction, that the expression, "due process of law," as used in the Fourteenth Article of Amendment, should be construed as it is commonly understood by the people who surrendered to the government of the United States, by the adoption of this amendment, their right to pass discriminative remedial State laws, and there is no better way of determining what was its common meaning—its ordinary usual meaning—than by reference to a line of authorities of judicial interpretations and definitions of law writers.

"Due process of law" means: "Law in its regular course of administration through Courts of justice."

Bouvier's Law Dictionary.
Rapalje and Lawrence's Dictionary.
2 Kent's Com. (8th ed.) 13.
2 *Spears* 767.

"Due process of law." "It is not the partial nature "of the rule so much as its ARBITRARY *and unusual*

"character that condemns it as unknown to the law "of the land. * * * The principles, then, upon "which the process is based are to determine whether "it is due process or not, and not any considerations "of mere form. * * * We are to test the validity "(of the process) by those principles of civil liberty "and constitutional protection which have become "established in our system of laws, and not generally "by rules that pertain to forms of procedure merely. "In judicial proceedings the law of the land requires "a hearing before condemnation, and judgment before "dispossession."

Cooley Const. Lim. (5th ed., pp. 435–6.)

"The words 'due process of law' were undoubtedly "intended to carry the same meaning as the words "'law of the land.' But neither in an enlarged sense "means that to deprive a man of his life, liberty, or "property by means of the law in its regular admin- "istration through Courts of justice, the intervention "of a jury is in all cases necessary."

1 *Abbott, U. S.* 332, J. Erskine, Justice.

The same author, after citing a case further on, says: "Other instances could readily be given to show that "the words 'by the law of the land,' 'due process of "'law,' do not necessarily import a jury trial as essen- "tial in every case to deprive a person of his life, lib- "erty, or property." How much less, then, the inter "vention of a grand jury?

Ib. 332.

Justice Folger, in discussing the meaning of "due "process of law," says: "The Legislature has the right "to take away a particular form of remedy or give a "new one. What is required of such legislation is "that there must be a hearing before condemnation, "and judgment before dispossession."

People vs. *Supervisors of Essex*, 70 N. Y. 234.

"Due process of law in each particular case means

"such an exertion of the powers of government as the "settled maxims of law permit and sanction, and "under such safeguards for the protection of indi- "vidual rights, as the maxims prescribe, for the class "of cases to which the one in question belongs."

Cooley Const. Lim. 356.
Ex Parte Ah Fook, 49 Cal 406.
Bertholf vs. *O'Reiley*, 18 Am. L. Reg., N. S., 119.

Where the statute makes ample provision for judicial inquiry it is "due process of law."

Pearson vs. *Yewdall*, 95 U. S. 296.
Murray's Lessee vs. *Hoboken Land Co.*, 18 How. 272–276.

"Law of the land and due process of law" mean the same in every case.

Crooley Const. Lim., Chapt. 11, p. 432, 5th ed.

The term "due process of law" does not mean in all cases process and proceedings of the common law.

Story on Constitution, Vol. 2, p. 662, Sec. 1941.

"The phrases 'due course of law,' 'due process of "law' in the Constitution, does not mean the gen- "eral body of the law common and statute as it was at "the time the Constitution took effect, for that would "seem to deny the right of the Legislature to amend "or repeal the law."

Vol. II, Abbott's Law Dictionary, 406–7.

"'Due process of law' cannot mean less than a prose- "cution, or suit, instituted and conducted according to "the prescribed forms and solemnities for ascertaining "guilt, etc."

Embury vs. *Conner*, 3 N. Y. 511–517.
Taylor vs. *Porter*, 4 Hill, 140.
Burch vs. *Newbury*, 10 N. Y. 374–397.

"Due process of law" means no more than a timely proceeding to judgment and execution.

Backus vs. *Shipherd*, 11 Wend. 629.

"'Law of the land' is a rule alike embracing and "equally affecting all persons in general, or all per- "sons who exist or may come into the like state or "circumstances."

Budd vs. *The State*, 3 Hump., Tenn. 490.

Webster defined law of the land as follows: "By "the law of the land is most clearly intended the gen- "eral law, a law which hears before it condemns; "which proceeds upon inquiry and renders judgment "only after trial. The meaning is that every citizen "shall hold his life, liberty, property, and immunities "under the protection of the general rules which govern "society.

Dartmouth College vs. *Woodward*, 4th Wheat, 519.

Justice Johnson said: "After volumes spoken and "written with a view to their exposition, the good sense "of mankind has at length settled down to this (speak- "ing as to words of Magna Charta): that they were "intended to secure the individual from the ARBITRARY "exercise of the powers of government unrestrained "by the established principles of private right and "distributive of justice."

Bank of Columbia vs. *Okely*, 4 Wheat. 235.
Story Const., Vol. 2., 1944, 5th ed. p. 664.

"When life and liberty are in question there must "in every instance be judicial proceedings; and that "requirement implies an accusation, a hearing before "an impartial tribunal with proper jurisdiction, and a "conviction and judgment before punishment can be "inflicted."

Story Const., 4th ed. 1943–1946.

Story, in treating of this subject, says: "Statute "law is in the highest sense the law of the land, and "the legislative department created for the very pur- "pose of declaring from time to time what shall be the "law, possesses ample powers to make, modify, and "repeal, as public policy or the public need shall "demand."

Story on Const., Vol. 2, 1943, 5th ed.

The foregoing several definitions are the constructions, both of the judiciary and of distinguished law writers on constitutional law that have been given to the phrases "due process of law," and "law of the land," and many more might be given with authority, but they would only be cumulative and only vary in phraseology and not in meaning.

In vain will we search in the books to find that "due process of law" means "upon presentment or indictment of a grand jury," with a single exception, and that is in Lord Coke's Commentaries on English Common Law.

By construing the Constitution with all of its amendments, considering it as one instrument, by the well established rules of construction applicable to the case, we have seen, the phrase "due process of law" does not mean "upon a presentment or indictment of a grand jury," nor has it been so construed by the judiciary of the country nor such distinguished authors on constitutional law as Story and Cooley.

Again, that we may understand the meaning the people of the States of the Union attached to the expression "due process of law," when they voted to adopt the Fourteenth Article of Amendment to the Constitution, this principal, in the language of Judge Story, was in force and understood to be the law of the land, to wit: "The States, in the enforcement of their "own laws for the preservation of peace and order, *may*

"*dispense with the grand jury*, if that mode of trial shall "be thought most politic or most conducive of justice." And proceeding further, he says: "And no more under "the Fourteenth Article than previously can the Fed- "eral Government interfere with the mode prescribed "for the trial of State offenses; whatever is established "will be due process of law so that it will be general "and impartial in operation and disregard no provi- "sion of Federal or State Constitution."

Story on Const., Vol. 2, Par. 1947, p. 666, 5th ed.

Then, when the Fourteenth Article of Amendment was adopted by the people, or the States, the common, usual, and most known signification of the phrase "due process of law," was process due according to the law of the land—judicial proceeding—"law in its regular course of administration through the Courts of justice," and this was the meaning they attached to it.

VI.

While the Fourteenth Article of Amendment was an amendment, viewed in the light of the manner provided for amending the Constitution, it was not an amendment in the sense that it affected a change in any section or article of that instrument already in force. It was a new provision, an additional concession to the General Government by the States, but what new concessions were made? That a correct construction may be given this amendment or concession, it becomes important to inquire into conditions then existing, the antecedent situation of the country and its institutions, the operations of the State governments; in short, into all the conditions that conspired to move the government of the United States to ask the concession, and the States to grant it. Justice Story, Vol. 1, page 298, Par. 404 and 405: "Much," he says, "may be gathered from contemporary history."

His Honor, Justice Miller of this honorable Court, in the *Slaughterhouse Cases*, 16th Wall. page 67, in speaking of this amendment among others recently adopted, says: "The most cursory glance at these articles dis-"closes a unity of purpose when taken in connection "with the history of the times, *which cannot fail* to have "an important bearing on *any question* of doubt con-"cerning their true meaning. Nor can such doubts, "when any reasonably exist, be safely and rationally "solved without a reference to that history."

The Union had been dismembered. The rebelling States had been subjugated, after a long, bitter, and disastrous struggle. Five millions of untutored, uncared for, and I might say helpless negroes had recently been emancipated from bondage. Discriminating legislation was had against them. Reconstruction of the late rebellious States was the work of the hour. How these States should be restored to their place in the Union, how these five million freedmen should be protected and provided for, was the business of the statesmen of the day, and the Fourteenth Amendment was devised to meet these conditions.

Slaughterhouse Cases, 16 Wall. 70, et seq.

The object and purposes of the Fourteenth Amendment was to create a national citizenship.

To prevent discriminative legislation against the negro, to make him equal with the most favored citizen before the law and the protection therein intended to be secured, was only to citizens of the United States and not citizens of the State as such—the latter were left for their security and protection where they had theretofore rested.

Slaughterhouse Cases, Ib. 75.

The privileges and immunities of citizens of the United States that shall not be abridged are such as

"the protection of the Government with the right to "acquire and possess property of every kind and to "pursue and obtain happiness and safety, subject, nev- "ertheless, to such restraints as the Government may "prescribe for the general good of the whole."

4th Washington C. C. Repts. 371.

These rights "have always been held to be the class of "rights which the State governments were created to "establish and secure."

Slaughterhouse Cases, 16 Wall. supra.

The objects of the adoption of the Fourteenth Amendment are very fully stated by his honor Justice Miller, in the case last cited, and kept in mind it seems to me will aid in the construction of the term "due process of law."

The amendment, while it was a concession, was also a guarantee of rights of the citizen. In this connection it is to be remembered that the expression, "no person shall be deprived of life, liberty, or property without due process of law," was incorporated in the fundamental law of every State in the Union; in most of them in this exact language and others in phrases of similar import.

Due process of law had been construed and had a well known signification at the very time it was considered and adopted by the people.

In the States of Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Hampshire, Oregon, Texas, Vermont, Virginia, and Wisconsin there was then, or immediately thereafter, in each of the above named States, no constitutional limitation as to abolishing the grand jury altogether. That is to say, the Constitutions of these States, either right at the time or immediately thereafter, did not provide for prosecutions by

presentment or indictment by a grand jury, but left the process to be fixed by the Legislature.

CONNECTICUT was then operating under her old Constitution of 1818, and had for long years prosecuted all crimes not punishable with death or imprisonment for life by information, and this her people understood to be due process of law.

DELAWARE provided that no indictable offense should be prosecuted by information But her Constitution did not define indictable offenses.

The Constitution of GEORGIA has the expression, "No person shall be deprived of life, liberty, or property without due process of law."

This is the only limitation in this State upon the power of the Legislature to provide what shall be the criminal procedure therein.

Const., 1868, Art. 1, Par. 3.

Under a similar provision all crimes are prosecuted by information in the State of Wisconsin.

Rowan vs. *The State*, 30 Wis. 148.

ILLINOIS:

Constitution of 1848, Art. 13, Sec. 10, provided for prosecution by indictment or information. Constitution of 1870, Art. 2, Par. 8, provides that grand jury may be abolished by law in all cases.

INDIANA:

Constitution of 1851, Art. 1, Par. 13: No restriction upon Legislature, nor nothing said about grand jury or indictment.

KANSAS:

Constitution of 1859, Bill of Rights, Par. 10, provides the right of accused to demand the nature and cause of the accusation against him; nothing said about grand jury or indictment.

All offenses against this State are proceeded against by information.

G. S. Kansas, 1868, Art. 8.
Laws of Kansas, 1879, Chap. 82, Art. 6.

KENTUCKY:

Constitution of 1850, Art. 13, Par. 12 and 13, in same language found in Kansas, *supra*, with following limitations: "No indictable offense can be presented by information." But Constitution does not define indictable offenses.

LOUISIANA:

Constitutions of 1845, 1852, 1864, and present Constitution provides that prosecutions shall be by indictment or information.

See Const. 1868, Title 2, Art. 6.

Prosecutions for all offenses not capital have been had by information in this State since 1855.

See Act of 1855, p. 151.
Voorhies Rev. S. 1876, Sec. 977, p. 258.

MARYLAND:

Constitution of 1867, declaration of rights, Art. 21, recognizes prosecutions by other charges or forms of procedure than indictment. Nothing said about grand jury. So was the Constitution of 1864.

MICHIGAN:

Constitution of 1850, Art. 6, Sec. 28, reads: "In every "criminal prosecution the accused shall have the right "to a speedy and public trial by an impartial jury; be "informed of the nature of the accusation against him, "* * * etc." Nothing said about information, indictment, or grand jury.

Under these provisions the Legislature authorized prosecutions by information without limitation.

Laws of 1859, p. 391; passed February 12, 1859.
Compiled Laws of Michigan, Vol. 2, p. 2174, Chap. 261, Sec. 7937.

MISSISSIPPI:

Constitution of 1868, Art. 1, Sec. 7, recognizes prosecution by indictment and information. Prosecutions by information limited to non-indictable offenses not defined by the Constitution.

NEW HAMPSHIRE:

Constitution of 1792, Part 1, Art. 15, reads: "No "subject shall be held to answer for any crime or "offense until the same is fully and plainly, substan- "tially and formally described to him, etc." This has been the constitutional provision of New Hampshire since 1792. Prosecutions are held there by information

General Laws, Chap. 260, Secs. 1 to 10.

OREGON:

Constitution of 1857, Art. 1, Sec. 11: "In all crim- "inal prosecutions the accused shall have the right "* * * to demand the nature and cause of the accu- "sation against him, and to have a copy thereof, etc."

Nothing said about indictment or grand jury. Legislature unrestrained as to criminal procedure.

TEXAS:

Constitution of 1866, Art. 1, Sec. 8, read: "And no "person shall be holden to answer for any criminal "charge before indictment or information." So read the Constitutions of 1845, of 1868. Prosecutions were quite common under these Constitutions by information. In 1876 this State adopted a new Constitution, and limited prosecution by information to offenses not punishable by imprisonment in the penitentiary.

VERMONT:

Constitution of 1793, Chap. 1, Art. 10, reads: "That

"in all prosecutions for criminal offenses a person hath "the right * * * to demand the cause and nature "of his accusation: * * * nor can any person be "justly deprived of his liberty except by *the laws of* "*the land*, or the judgment of his peers."

Under this provision the Legislature provided for criminal procedure by information.

Vt. General Statutes, 1862, Chap. 120, Sec. 1.
Vt. General Statutes, 1868, p. 274.
Revised Laws of Vt., 1880, Sections 1608–9–13–37 and 1647.

VIRGINIA:

Constitution of 1870, Art. 1, Sec. 10. In purport same as Vermont, *supra*, and prosecutions are had by information.

WISCONSIN:

Constitution of 1848, Art. 1, Sec. 8, as amended in 1870, reads: "No person shall be held to answer for a criminal offense without due process of law:".

This section and article formerly read: "No person * * * and unless on presentment or indictment of a grand jury."

Immediately upon the adoption of the amendment of Art. 1, Sec. 8, so as to make it read due process of law, the Legislature provided that all prosecutions should be by information, and the grand jury was abolished, so that it appears in this Constitution "due process of law" means prosecutions without the intervention of a grand jury.

Rowan vs. *The State*, 30 Wis. 129.

Can it be said that in the light of the constitutional provisions of the States enumerated, and the practice that was and is now in force under those Constitutions, that when they adopted the Fourteenth Amendment

they meant or understood a different meaning to attach to the phrase "due process of law" than definitions hereinbefore cited, that it should mean upon presentment or indictment of a grand jury. The contrary is evidenced by the fact that they have not changed their Constitutions to conform to this meaning, but have in some instances since altered their Constitutions and abolished the grand jury—notably in the case of Wisconsin. The following States are now proceeding by information against criminals: California, Connecticut, Indiana, Kansas, Louisiana, Michigan, New Hampshire, Vermont, and Wisconsin.

Then in the light of the constitutional history of the country at the time of the adoption of the Fourteenth Amendment should the construction, contended for by plaintiff in error obtain. Was there any reason in view of the fact that this amendment was specially intended to alleviate the condition of the negro, that he should have the right to be proceeded against by presentment or indictment of a grand jury — none that can be imagined nor none revealed by the history of the time. Its objects were to have the same law for him that obtained for the white man; it was equality before the law; an injunction that all laws should be general and equal in their operations upon all citizens of the United States. In the light of his Honor Justice Miller's decision, that safeguards were extended to citizens of the *United States* by the terms of this amendment, but did not extend to the citizens of the State, then, should such construction obtain, could not Congress provide that no State should proceed criminally against any citizen of the United States without the intervention of a grand jury, and thus secure a uniform rule of criminal procedure in every State in the Union as to such citizen, but would it not be in direct violation of that principle, as fundamental

as any known, that the States over matters within their jurisdiction are sovereign and absolute?

Potter's Dwarris, p. 351.

The objects to be met by the adoption of the Fourteenth Article of Amendment considered; the definition of the phrase "due process of law" considered; the Constitution of the various States and the criminal procedure by information that obtained at the time of its adoption considered; the construction that the context of the entire Constitution taken together places upon that phrase, can it be said in any sense to mean "upon presentment or indictment of a grand jury?" and that it has any other than the usual and commonly understood signification.

The limitation on the power of the States to regulate and provide their own remedies and criminal judicial proceedings must be found in either express terms or by necessary implication in the Constitution or else it does not exist. In our system of government there are two sovereign powers, both limited. The United States Government only possesses such powers and jurisdiction as is granted in its charter or Constitution as granted or adopted by the people or the States; the other, State governments, the creator of the first, holding all residuary authority and power not granted to the General Government. These sovereigns are distinct from each other in construction, purpose, and result. The Government of the United States, "erected "for special purposes" * * "It can neither grant nor "secure to its citizens any right or privilege not ex- "pressly or by implication placed under its jurisdic- "tion." The powers which the State Governments possess the United States does not and vice versa.

United States vs. *Cruikshank*, 92 U. S. 550.

Can it be said that there is to be found anywhere in

the Fourteenth Article of Amendment any implied provision inhibiting the States from proceeding criminally against an accused by information? It is only sought for in the phrase "due process of law."

But this Court has frequently defined this term, but never has yet given it such a construction.

Dartmouth College vs. *Woodward*, 4 Wheat. 519.
Den vs. *Murray et al.*, 18 How. 272.
Walker vs. *Sauvinet*, 92 U. S. 90.
United States vs. *Cruikshank*, 92 U. S. 550.
Bank of Columbia vs. *Oakley*, 5 Wheat. 244.

But we are not entirely without authority directly in point on the question involved in this case. It has been held by two State Supreme Courts, competent for the State to dispense with a grand jury in all cases, and to proceed by information, without violating any principle of the Fourteenth Article of Amendment to the Constitution of the United States.

Rowan vs. *The State*, 30 Wis. 129.
Kalloch vs. *Superior Court*, 56 Cal. 229.

And if your Honors have not already held the same doctrine you are certainly on the threshold, and one step further in the line of principles announced in *Walker* vs. *Sauvinet*, 92 U. S. 92, and this question will be put at rest. This Court said in that case: "*The* "*States, so far as this amendment (meaning Fourteenth* "*Article) is concerned, are left to regulate trials in their* "*own Courts in their own way.* A trial by jury in suits "at common law pending in the State Courts, is not, "therefore, a privilege or immunity of national citi- "zenship which the States are forbidden by the Four- "teenth Amendment. A State cannot deprive a per- "son of his property without due process of law, but "this does not necessarily imply that all trials in the "State Courts, affecting property of persons, must be by

"jury." It would, however, if due process of law meant to incorporate the common law remedies in our judicial procedure beyond legislative control. "This "requirement of the Constitution is met if the trial is "had according to *the settled course of judicial procedure*. "Due process of law is process according to the law of "the land. *This process in the States is regulated by the "law of the States.*"

This is the doctrine of the highest Court known to our system of jurisprudence, in *Walker* vs. *Sauvinet*, 92 U. S. 92–3.

What sacred right is it plaintiff is contending for? The right to have had nineteen lawful citizens sit in solemn secrecy to hear his cause from his prosecutors ex parte, and to return into Court "a true bill" against him. No one, it seems to me, familiar with the manner of investigations by grand juries would complain because he had been deprived of a hearing before a secret tribunal, constituted and constructed as this is. No one who appreciated life or liberty would clamor after a hearing before a grand jury when he had the privilege of going before a committing magistrate, in open day, be confronted by his accuser at the threshold of his cause, see them and hear them and be prepared to meet their accusations, and if he desire, put in his defense.

This, unless it is inhibited by the Constitution to the States, will ere long take the place of the grand jury, because it commends itself to those interested. For the people the grand jury may be the better method of procedure; but what accused would exchange an open examination before a committing magistrate for a secret inquisition into his offenses?

It is submitted that Sec. 8 of Art. 1 of the Constitution of the State of California and the penal provisions thereunder, and had in the case at bar, are not repugnant to the Fourteenth Article of Amendment to the Constitution of the United States, and for this reason the judgment of the State Court should be affirmed.

JOHN T. CAREY,
District Attorney.

110-546

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1207.

JOSEPH HURTADO, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

In Error to the Supreme Court of the State of California.

Reply Brief of Plaintiff in Error.

A. L. HART,
Attorney for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

I regret that the time allowed by this court is not sufficient to enable me to critically examine the authorities cited and relied upon by the learned attorney for the defendant, and that I shall be compelled to content myself with answering a few of the suggestions of the greatest apparent potency made at the time the argument was in progress.

The hostility of some of the people of some of the States to the colored race was the occasion of the adoption of all the provisions of the 14th amendment, and whatever of truth or falsity there may have been in it, there was, at the time that amendment was adopted, a general belief existing in the minds of nearly all the people of the loyal States, that in some, at least, of the States which waged the late rebellion, the freedmen were not only subjected to invidious distinctions and discriminations, but that they were deprived of important rights of property, as well as of life and liberty, by arbitrary modes of trial adopted by some of the States for that purpose. The

amendment was certainly designed to operate as an important limitation upon the powers previously exercised by the States, and that there is now some point beyond which the States are forbidden to go in the regulation of their own process or procedure is true beyond question.

The words "due process of law" were clearly not adopted into the constitution with the idea of permitting their meaning to be subjected to processes of expansion and contraction in the different cases arising, according to the varying judgments of the different legislators and judges upon whom might devolve the duty of interpreting them; they were intended to be used in their unvarying legal and technical sense, and were designed to give absolute protection to such substantial rights of individuals as were then understood to fall within their legal signification; they were clearly not intended simply to secure to persons the right to be tried according to any law which the legislature might see fit to pass "in its regular course of administration through courts of justice," because, if such were true, *due* process would be any process provided by general statutes; process would become due at the mere will of the power against which the inhibition was directed, and the provision under consideration would absolutely fail to effect any purpose whatever, except, perhaps, that (which is fully provided for in the equality clause) of requiring general rules, with uniformity of operation. As suggested at the argument, if such were the true interpretation, the amendment would be worthless in this respect, because any of the late Confederate States, by general laws, might, under such circumstances, confer upon judges, in criminal cases, the discretionary power to grant or refuse a trial according to any of the methods mentioned in the 5th and 6th amendments; and if, under such a general law, a judge should regularly grant to white men, and refuse to negroes, the right of trial by indictment, the right to trial by jury, the right to con-

front their witnesses, &c., there could be no power in the United States Government that could correct the abuse, unless the rights denied to the one and granted to the other were secured by some provision of the fundamental law of the nation. Under such circumstances, the injured negro could not get relief on the ground that one or many white men had been tried, and that all or any of the discretionary rights denied to the former had been granted to the latter; the law would be general in its operation; each of the classes of persons would be subjected to the same general jurisdiction; their rights would be controlled by the same arbitrary discretion of the judge; and, under such a state of things, the correctness or propriety of the conduct of the judge in refusing or granting the rights thus left to his discretion could never be questioned in a judicial proceeding unless those rights were in some manner secured by the laws of the nation.

If the construction contended for by the learned attorney for the defendant should obtain, the officers of a State would have the power, under State legislation authorizing it, to conduct trials in the manner above set forth, under familiar principles. This court would have no power to interfere with the result of State trials for State offenses, conducted according to State *legislation*, unless that *legislation* violated some principle of the federal constitution. If the "*due* process clause" is only effectual for the purpose of securing generality and uniformity in legislation, that clause would not be violated by a general law vesting in a court, or even in a district attorney, the absolute power of determining whether an individual on trial for a capital offense should be tried in public or in private, should be charged by indictment or by information, should be tried by jury or by the court, or should be heard by counsel or forced to conduct his own defense. A striking illustration of what may be attempted by the States in this respect will be found in the provision of the constitu-

tion of California, and the several provisions of the statutes of that State, the validity of which is here challenged. By the laws of that State the power is clearly conferred upon the prosecuting officers, at their mere will, to prosecute one man or one class of men by information, while at the same time they may extend to another man, or class of men, the right to have his or their case or cases heard and determined by a grand jury before subjecting him or them to the jeopardy of a public trial. To make the illustration complete and bring the case clearly within one of the clauses of the amendment, it would only be necessary to transfer the scene to one of the Southern States, recently rebellious, and to put a constitution similar to that of California into the hands of a prosecuting officer hostile to the colored people.

Will it be contended that the right to a speedy and public trial may be destroyed or materially abridged by a State, notwithstanding the 14th amendment, provided only that the rule be made general, so that all in the community are alike subject to its operation? Will it eb said that persons charged with crime may be denied the right of trial by jury, as well as the right to confront the accusing witnesses, by State legislation, and that such legislation, whether general or special, uniform or discriminating, is not inhibited by the amendment? Such a construction, it is respectfully submitted, would destroy the efficiency of the particular clause under consideration, as a limitation upon the arbitrary exercise of State power, and would leave in the States the right, *by general laws*, to make anything due process of law at their mere will. A law giving to the district attorney the right, in all cases, to determine at his discretion whether a man should be granted a trial by jury, would thus be brought within the definition "*of due process of law.*" It would seem self-evident that such was never intended in the framing of the amendment. That amendment was certainly in-

tended to secure certain well-established legal rights. It was not the intention, by it, to secure mere legal formalities, but it was designed to perpetuate certain substantial "*processes*" which had grown up in the laws of England, which had for centuries been recognized as essential barriers against official encroachments upon the liberties of the people, and which had been adopted into this country, as applicable to our institutions and local necessities, after the immigration of our ancestors. These "processes" are easily selected and separated from the great mass of minor, formal rights secured by the common and statute laws of this country. They were selected by our ancestors when they framed the 5th and 6th amendments, and they were expressly enumerated by them; by these amendments these rights were not only recognized as a part of due process of law, but they were made by constitutional enactment essential proceedings, without which no process in the Federal courts could be "due."

It will require no argument to prove that indictment by a grand jury is an essential part of due process of law in all capital and infamous cases prosecuted in the Federal courts; the right of trial by indictment in those cases and in those courts is fundamental because it is secured and guaranteed by the fundamental law. The constitution not only requires "due process" in the courts of the United States, but it prescribes what that "due process," in criminal cases, is by expressly enumerating all the rights to which a defendant is, and for centuries has been, entitled in such cases; and a person tried in those courts could never successfully impeach a judgment adjudging him guilty of a criminal offense, as having been rendered without due process of law, if all the rights particularly enumerated in the 5th and 6th amendments had been accorded to him at the trial. It is evident, therefore, that the words "due process of law" as applied to capital and felony cases, and as used in those amendments,

include the right of trial by indictment of a grand jury, and the other rights therein specifically enumerated, *and none others*.

These same rights were intended to be, and were, secured to all persons against the legislation of the States; they are all in the same category, and the power which may destroy one can destroy all of them. If such rights were not intended to be secured it is hard to conceive what was the purpose of the amendment.

Nor is there anything monstrous in the fact that the right of trial by indictment and by jury, and the other rights embraced in the definition here contended for, are made perpetual in the States, when we reflect that the people of the United States have, by the express language of the constitution, secured to themselves those same safeguards against any attempt which may be made by the officers of the Federal government to exercise despotic power over their lives, liberty, or property.

The proposition in this case is well stated by Mr. Bishop in the last edition of his work on Criminal Procedure. The universally conceded meaning of the words "law of the land" as used in the English charter was that they were identical in their import with the phrase "due process of law," and that the latter words, when applied to felony cases, meant that the "process" should be by indictment or presentment of good and lawful men. We not only adopted into this country the common law, embracing this mode of trial, but in full view of these definitions, we adopted into our constitution a provision that this "due process" known to the English system, of which ours is a derivative, should forever be preserved. Under well-settled rules of construction, it must be determined that the words were borrowed from the English laws with their settled legal meaning. An examination of the first brief filed in this case will demonstrate that this view was sustained by all the American text writers who wrote upon

the subject up to the date of the adoption of the 14th amendment.

Some reliance, however, is placed upon the language used by Mr. Kent at the conclusion of his discussion of this subject. It is apparent that the true meaning of that language has been misconceived. Mr. Kent said: "The words 'by the law of the land,' as used in Magna Charta, in reference to this subject, are understood to mean *due process of law*, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of due process of law is, in its regular course of administration through courts of justice."

The first part of that definition contains a particular application of the doctrine to criminal cases, and with that the latter part does not in any manner conflict. The regular course of administration of law through courts of justice, in felony cases, at the time that Mr. Kent wrote, was by indictment or presentment of good and lawful men. This "*larger*" definition given by Mr. Kent was the mere statement of a general proposition applicable to all cases, whether criminal or civil, at law or in equity, *in rem* or *in personam*, and was given without any effort to define what would be the regular course of administering law in particular cases. This latter definition is more obscure in its meaning than the words of the constitution which it was intended to define. It would require a vast deal of research to find what would be the regular course of administering law in all the different classes of cases; such a pursuit would necessitate an examination of the whole body of the common law.

In the case of Davidson *vs.* New Orleans this court said that there could be no general rule stated which would at once determine what would be due process of law in all the different cases, but that each case as it arose would

have to be determined by the nature of the case itself and the law applicable to it. In the ascertainment of the rule to be applied to each case the court must look to settled usages and fundamental principles, and thus, "by the process of exclusion and inclusion," find the processes allowed, and those prohibited by the constitution; and it is by this method we are to learn, in each case, what is "law in its regular course of administration through courts of justice."

Besides, if it was the design of the author to give to the phrase a meaning different from that which it possessed under the English system from which we borrowed it, he must have violated that thoroughly settled rule of construction, which is, in effect, that words possessing a technical meaning are understood to have been adopted with that meaning. This rule is particularly applicable in this case, because, without their legal meaning, the words can hardly be said to possess any definite signification.

It will therefore be seen upon examination that at the time of the adoption of the 14th amendment, there was no conflict of opinion among the text writers, but they all agreed upon the interpretation here contended for. This interpretation, as well as the doctrine of Murray's Lessees *vs.* The Hoboken &c. Co., was adopted into, and became part of the constitution, and any construction which would give to those words any meaning other than that which they were understood to possess at the time they were adopted would in effect operate as an amendment.

Judge Cooley's opinion in his recent edition of Story on the Constitution, upon which defendant has placed so much reliance, does not purport to be based upon any authority or research, and is in conflict with the original text in Mr. Story's work, as will be seen by examining the citations in the original brief filed by the plaintiff in error.

The assertion that the construction here contended for would logically result in making the common law system of pleading perpetual in the States is clearly ill-founded. *The due process clause of the constitution refers to certain fundamental rights which that system of jurisprudence of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation would not have been punished by due course of law.*

Although the legislature may, at its pleasure, provide new remedies, the power is nevertheless subject to the condition that it cannot, by a new formula, overthrow ancient and fundamental rights, which have been respected and observed in judicial procedures.

Brown *vs.* Levee Commissioners, 50 Miss., pages 479, 489.

Thus while it is proper, in formal matters, for the States to amend their judicial systems, it would not be competent for the States to destroy their judicial tribunals, and submit the rights of their citizens to the determination of tribunals lacking in the essential judicial features of our system of judicature, and while the legislature may amend the rules of evidence, it may not destroy the system by which facts are to be determined upon evidence; so too while the legislature may amend the grand and petit jury systems, it cannot destroy either.

The substitution of the finding of a magistrate for the determination of twelve of the common people, would be but a poorly constructed evasion of the constitutional requirement here contended for. The main feature of the grand jury system of England was its freedom from official bias, and in this consisted its chief value. The principle was that the citizen was protected against prosecution even though the King might command his magistrates and other officers to prosecute, unless twelve of the com-

mon people, acting without connection with political or official intrigue, should assent to the charges. If the determination is to be made by an officer of the Crown, it could matter but little to the subject whether that determination is to be made by the superior or inferior judges, or by the law officers; for the subject is then not independent of the officers of government, but is in their hands.

The magistrate is not protected in his existence by constitutional guaranty, while it is respectfully urged that the right of the citizen to have twelve men pass upon the question of probable cause before he may be prosecuted is secured to him by the constitution. If the power here sought to be exercised by the State be sustained by this court, there will remain nothing to prevent the States from placing their citizens at the absolute mercy of their prosecuting officers. This certainly cannot be done in this country.

Respectfully submitted,

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